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Supreme Court of the United States

OCTOBER TERM, 1936

No. 797

ALBERT A. CARMICHAEL, as Attorney General of the State of Alabama, et al,

Appellants,

vs.

GULF STATES PAPER CORPORATION

BRIEF FOR APPELLEE

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Supreme Court of the United States

OCTOBER TERM, 1936

No. 797

ALBERT A. CARMICHAEL, as Attorney General of the State of Alabama, et al,

Appellants,

vs.

GULF STATES PAPER CORPORATION

OPINION AND DECISION BELOW

This cause was decided below on final decree by a court sitting in the District Court of the United States for the Middle District of Alabama, assembled in accordance with Section 266 of the Judicial Code, composed of Circuit Judge S. H. Sibley and District Judges R. T. Ervin and C. B. Kennamer.

The opinion below consists of a statement, findings of fact and conclusions of law set out in the record, not yet reported.

The bill of complaint sought and plaintiff obtained temporary injunction restraining the enforcement of the Alabama Unemployment Compensation Law.* By final decree the

*Approved Sept. 14, 1935, Gen. Acts 1935, p. 950. Thrice amended April 21, 1936; Acts 1936, pp. 176, 225, 228. Amended Feb., 1937.

We have not yet (April 3) received appellants' brief, but understand that the Act will be printed in full therein.

injunction was made final, "the said Act being held and declared to be unconstitutional and void because in conflict with the Fourteenth Amendment of the Constitution of the United States and with Article I, Section 23 of the Constitution of Alabama." (R. p. 184). The Court (conclusion of Law No. 7, (R. p. 183) asserted that it was therefore "unnecessary * * * to pass on the constitutionality of the Federal Act."

THE QUESTIONS AND STATUTES INVOLVED

The two questions necessarily involved on this appeal are

(1) The question whether the Alabama Unemployment Compensation Law is *valid* as applied to the appellee (plaintiff), Gulf States Paper Corporation, under the Fourteenth Amendment to the Federal Constitution, and

(2) The question whether the Alabama act is *operative* in view of its express and intrinsic dependence upon the validity of the unemployment compensation provisions of the Federal Social Security Act*, which are asserted to be invalid because of their violation of the Federal Constitution.

The District Court below had jurisdiction over the entire controversy as to the validity and enforcement of the State Act because of the federal (three-judge) question presented by the prayer for and grant of temporary injunction and because of the diversity of citizenship and amount involved. Plaintiff had the right to include in the suit challenging the enforcement of the State statute as being void under the Federal constitution any additional ground, federal or non-federal or derivative, including the contention that the statute by its own terms was self-destruc-

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*Act Public No. 271, 74th Cong., H. R. 7260, approved August 14th, 1935, 49 Stat. 620, 626, 639; 42 U.S.C.A. §§501-503, 1101-1110.

tive as being expressly and intrinsically conditioned upon an invalid Federal Act and scheme. All such questions, both federal and local, were properly before the three-judge court and are here on appeal.* They were, irrespective of any federal tax feature, the *actual controversy* before the court below—and here.

THE STATE SUPREME COURT HAS SETTLED THE QUESTIONS ARISING UNDER THE STATE CONSTITUTION

In a State court case decided March 18, 1937 (*Beeland Wholesale Company v. Carmichael*, MSS. printed in full in appendix to Brief for Appellants therein), commented upon below, the Supreme Court of Alabama held the Alabama Act not to be violative of the Constitution of Alabama or of the United States. Application for rehearing has been made and the certificate of affirmance recalled or stayed; but in view of the decision no argument is made here by appellee *based on the State Constitution.*

We accept fully that opinion's express and implied interpretations of the Alabama Act and of the Alabama Constitution, and confine the discussion to the two basic questions stated above, both related to the application of the Federal Constitution.

The opinion of the Alabama Supreme Court has a direct and important bearing because of its holding that the Alabama Act is not only dependent upon the Federal Act as a legislative condition but is organically and necessarily tied into the Federal Act "to have an effective field of beneficial oper-

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*Siler v. L. & N. R. R., 213 U. S. 175, 191;
L. & N. R. R. Co. v. Garrett, 231 U. S. 299;
Van Dyke v. Geary, 244 U. S. 39.

ation for the public welfare," forms a part of a nationwide economic scheme provided for by the Federal Act, without which it could not have the influence on economy which is the foundation for its existence.

We take this holding, quoted in the margin,* to be binding upon this Court as to the nature and dominant intent of the Alabama Act and that, so far as the State of Alabama is concerned the Federal Act is regarded as the *causa sine qua non* of the State law.

Since, accordingly, that court has asserted unconditionally that "The Alabama Act is dependent upon the constitutionality of the Federal Act" we omit elaboration here of the inextricable dependence of the Alabama Act upon the validity

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*Opinion of Supreme Court of Alabama in Beeland Wholesale Company v. Carmichael, MSS (March 18, 1937):

"The Alabama Act ties into it (the Federal Social Security Act), and forms a part of a nationwide economic scheme provided for by the Federal Act. Unless it is tied up to such a widespread program, it probably could not have the influence on economy which is the foundation for its existence. * * * Expressly made to depend upon a decision of the United States Supreme Court upholding the Act, in reality it is merely dependent upon its constitutionality. Reference is made to the decision of the United States Supreme Court because that is the only court which has the authority effectually to declare it unconstitutional.* * *

"It is necessary for us to lay down the law of this suit as we understand it, and since the Alabama Act is dependent upon the constitutionality of the Federal Act, it is necessary to express our opinion as to that insofar as it affects its unemployment features, since the United States Supreme Court has not acted on it." * * *

"It is evident that the State does not wish to embark in the 'social security' business except in cooperation with the Federal Government. It is also manifest that the life of the Alabama Act is dependent on what the United States Supreme Court may hold on the validity of the Federal Act * * * its life and existence is dependent upon the result of the holding of the United States Supreme Court as to the validity of the Federal Act * * *"—Concurring opinion by Chief Justice Anderson.

of Title III, which furnishes the sole means of administration, and Title IX, which supplies the organic and indispensable bony structure and foundation for the State Act.

We argue below and there state the facts as to the dual constitutional infirmity in making a State Act dependent upon and involving a contractual relation with the Federal Government under a Federal Act (delegation and unlawful assumption of state sovereignty) or dependent upon the ultimate conclusion unknowable in advance which this Court or any other court will announce as to the validity of the Federal Act (thus constituting legislative uncertainty so far as the Alabama Act is concerned: *International Harvester Co. v. Kentucky,* 234 U. S. 216)*; discussed *infra.*

This interdependence between the Federal and State statutes, resting in substantial respects on a contractual basis, relating to the police and tax powers of the State, is an aspect of the case omitted from consideration by the State Court, perhaps because of the impression that all basic questions of this grave Federal nature, involving the integrity of the dual system, should await the final analysis of this Court.

STATEMENT OF THE CASE

The Nature of Plaintiff's (Appellee's) Business

The facts as related to plantiff (appellee) are not in controversy, resting upon the undisputed factual averments of the bill and more detailed supporting averments as to plaintiff

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*Chief Justice Anderson in the opinion quoted asserted that a decision as to the validity of the Federal Act (and hence the existence of the State Act) would be "speculative."

found in the affidavit of its Secretary, H. D. Warner* (R., p. 114).

Plaintiff is a manufacturer of kraft paper, located at Tuscaloosa, Alabama. It began operations in 1928 and has, with nominal interruption, been continuously operated throughout the depression, with an increasing personnel and no prospect ahead of appreciable exits from its employment except such as may be due to the volition of its employees. Plaintiff employs about 800 employes, including salaried central office workers and plant workers employed both on a salary and on a wage basis.

Its annual payroll is over $800,000. The direct (employer) tax on plaintiff under the Alabama Act will range from $8541.70 for 1936, being at the rate of 9/10 of 1%, to an estimated $25,843.06 (2.7%), *on the basis of the present personnel,* for 1938, 1939 and 1940, in addition to a flat 1% which plaintiff must withhold from all salaries and wages. After 1941 plaintiff stands the chance of reducing the employer tax to a minimum of 1.5%, or being taxed as high as 4%, according to the sole discretion of the Commission, with no statutory test or measure to guide its discretion in fixing the tax and no method prescribed for reviewing it. Ala. Act, Section 4.

Until 1941 the rate of the employer tax is on an annually increasing scale, being for each year until 1941 90% of the Federal payroll tax levied under Sec. 901 of the Federal Act,

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*To facilitate submission for final decree in this and the companion case before the three-judge court (on appeal here, subnom., *Carmichael v. Southern Coal & Coke Company*, No. 724), the plaintiffs and defendants in the two cases (here Nos. 724 and 797) by agreement adopted as evidence the same affidavits, in addition to the averments of the respective verified bills and answers in so far as they averred facts.

that is, the exact amount of the credit on the Federal tax allowed by Sec. 902 of the Federal Act.

The annual cost of complying with the statistical and accounting requirements of the tax is not less than $2,000 for employers of several hundred employes (Affidavit of Childers, R. p. 141.) Here there are eight hundred.

Before the State Act begins to function by the distribution of benefits to unemployed persons (deferred for two years by the Act in response to that condition in the Federal Act), there will be exacted from plaintiff the sum of not less than $51,895.24, plus the cost of administration, all of which is to be paid over, meanwhile, to the Federal treasury for its use as free assets and without any right of withdrawal by the State, even if it should desire to abandon the scheme either as to the employer or employe contribution or in its entirety.

The tax for the single objective of this Act (unemployment insurance), never before a subject of State taxation, is shown to approximate, for a representative employer, 46% of its total taxes for the support of the state, county and city, and 117% of its total taxes for the support of the national government (Affidavit of Childers, R. p. 144).

In short, it is shown on this record that by an Act adopted without public hearing, previous public discussion or available economic data, and in response to a Federal Act, as now conclusively asserted by the Alabama Court, the service of insurance of other people's ex-employes, has become a tax burden of plaintiff greater than the burden for the support of any single major State function, education, public health, administration of justice, police protection, highways and greater than the tax obligation for the support of all functions of the Federal government combined.

So far as direct or perceptible or special benefits to this plaintiff are concerned, the facts make it indisputable that they are none or negligible.

This is shown to be true as to plaintiff (a) both as an employer of wage and salaried workers in Alabama, since no distribution is ever to be made to any employed person and none (or at most, a nominal possibility) is to be anticipated for plaintiff's ex-employes of the distant future; (b) it is also true as to plaintiff as a member of the general public of Alabama expected to benefit from the theory of improved purchasing power by unemployed persons. Not more than 5% of plaintiff's product is marketed in Alabama. If it be assumed that the total exaction paid by Alabama employers, including plaintiff, is hereafter reclaimed from the Federal treasury and filters back into local trade, the direct benefit to plaintiff, in the constitutional sense of offsetting benefits, is remote and imperceptible, and may be dropped from consideration.

The relation of plaintiff to present and prospective exits of its employes into the ranks of involuntary unemployed is thus further summarized, without dispute:

> "There is no present prospect in the operation of the business of Gulf States Paper Corporation of stoppages of operation or of any substantial curtailment of employee personnel."—Affidavit of Warner, R., p. 117).

SUMMARY OF ARGUMENT

A summary of the argument appears in the narrative headings taken from the text which are collected in the index. In order to avoid repetition that summary is not restated at this point.

BRIEF AND ARGUMENT

PART I.

THE ALABAMA LAW IS VIOLATIVE OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

(a)

The exaction takes money from one arbitrarily selected group for the benefit of another.

The Supreme Court of Alabama holds in the *Beeland Case* that improvement of the purchasing power of the unployed by direct public aid, is a public objective within the police power of the State—and is therefore not subject to the bar of Section 23 of the State Constitution.*

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*Section 23 of the Constitution of 1901 provides:

"23. That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; *and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association.*

The question remains, accordingly, whether the aid of some of the unemployed is primarily public in character or is merely money taken from a group of selected employers for the direct benefit, beginning in 1938, of an unknown and limited group of unemployed persons who happen to have worked last for one of the taxed group; and if public in character whether this direct expropriation is consistent with the 14th Amendment; in short, whether any specially selected tax group, however rationally selected from the standpoint of revenue production, can directly be made to bear the sole burden of unemployment relief declared by the Alabama Court to be a statewide public purpose in Alabama.

First of all, the tax, which never under any circumstances reaches the treasury, has been conclusively asserted by the Alabama Court to be not a revenue measure but a means for making effective a police regulation for the benefit of the State at large through aid to the unemployed.

The opinion of the Alabama Court in the group of cases herein referred to as the *Beeland Case** asserts that the levy is a tax, *earmarked for a certain police purpose;* and that the tax "must square with due process and equality."

> "The tax we are dealing with now, the State tax, is laid for a definite purpose and the amount collected is to be put in trust to be used for no other purpose. The tax levied cannot be separated from the purpose to be accomplished, and the resulting benefits to the employer class generally."—Opinion, *Beeland Case.*

**Beeland Wholesale Company v. Kaufman,* No. 198;
Talladega Ice & Storage Company v. Carmichael, No. 197;
West Point Mfg. Company v. Carmichael, No. 200;
Alpha Portland Cement Company v. Carmichael, No. 201;
P. O. Adams v. Dwight Manufacturing Company, No. 436;
Hubert Killian v. Gulf States Steel Company, No. 437.

This is supplemented by a conclusion that the tax is in fact and intent not a revenue measure at all but a police or benefit exaction in furtherance of the police power.*

Being not a revenue measure or tax but a police exaction, taking money directly from one segregated group for the immediate benefit of another, the scheme is to be subjected to the test of the Fourteenth Amendment applicable to extraordinary legislation of that character and not solely to the test of tax classification permitted in levying excise taxes for the general treasury.

The scheme must stand trial before the Constitution both as a tax and as a police regulation.

It is our contention that the scheme, however construed, is a shocking violation of fair play, carries implications that threaten a republican form of government, and as such is violative of the due process and equal protection clauses of the 14th Amendment.

If any accepted tax group, such as utilities, or manufacturers, or druggists, which may concededly be classified for excise taxation or exemption without offense to the 14th Amendment, may also, *by reason of that fact alone*, be subjected to the direct burden of any conceivable public aid measure, such as relief of indigency or relating to any other function for which the general public is in fact as much responsible as the taxed group, then we are at the end of equal protection of the law and of constitutional government.

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*"It is also insisted that the passage of the Act violated Section 70, Constitution, in that it is an Act to raise revenue and originated in the Senate instead of the House as that section requires. But when an act has for its main purpose provision for the general welfare by enacting a scheme within the State's police power, it is not one to raise revenue, though it does so as an incident to such scheme."—*ib.*

(b)

The doctrine of off-setting benefits does not sustain the exaction levied upon Appellee and employers similarly situated or justify their classification for the support of unemployment relief.

The levy of an exaction of the nature here involved must rest either upon the doctrine of off-setting benefits conferred in the exercise of the police power or upon reasonable responsibility of the subject of the exaction for the evil sought to be remedied by the taking of the money.

First, as to the question of off-setting benefits. In this case, there is no finding of such benefits by the State court, or by the Court below. There have been no legislative hearings or reports. There are no statutory findings or recitals. Certainly there is no judicial knowledge in this Court, beyond the local information of the Supreme Court of Alabama, to the effect that in Alabama special and peculiar benefits will accrue to the employers taxed from the creation of the fund.

Any such consequence is denied here by the verified bill, accepted as evidence, by proof and by the findings.

The Supreme Court of Alabama has not made any pretense that the employers taxed by this Act are, in any remote or constitutional sense whatever, responsible for unemployment in general or for prospective unemployment or indigency of unemployed in 1938 or thereafter, either as to their own former employes or former employes of the other, remote, unknown and unrelated employers pooled by the Act.

In sustaining the Act, the Alabama Court ignores the constitutional necessity that there be some inherent, peculiar or natural duty, benefit, relation, responsibility, obligation

or menace before it can be reduced to final legislative judgment in the form of a direct regulatory tax in favor of a supposed beneficiary of the duty or object of the menace.

The Alabama Court disclaims in the *Beeland Case* any rationale for this tax other than the unrelated conclusions

(a) that increased purchasing power of a portion of the unemployed on a state wide basis (not confined to a single industry as, says the court, was the pension fund in *Railroad Retirement Board v. Alton R. R.*) is a matter of public concern; and

(b) that an excise tax can be levied upon employment.

This omits from consideration the heart of the attack upon the statute, that appellee and the selected employers taxed have no more constitutional responsibility for unemployment than the employers, citizens, and businesses not taxed; will not benefit and are not intended to benefit from the exaction any more than the persons not taxed; and can not fairly be made to stand the cost of "eradicating an evil" which, to the extent not insoluble, is the fault of government itself or of society.

The group taxed, consisting of selected employers having at present in their employ less than 27% of the salaried and wage workers of the State,* and the future unknown group of ex-employes to be given relief beginning in 1938, have no such relation, as between the members of the employer group on the one hand and the future unemployed beneficiaries on the other, as to justify public regulation of the relationship between the groups by compelling the one to make provision

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*R., p. 75, estimated at from 20%-30% by the Federal Social Security Board, R., p. 120, 121.

to support the other for the general welfare. We discuss under separate heading below the arbitrary character of the 8-worker 20-week classification of the taxed group.

Appellee contends that this direct compulsion is arbitrary in every phase and goes far beyond the violation of due process determined in *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330.

The basis of the Alabama Court's distinction of that case is, of itself alone, sufficient to condemn the scheme here as an arbitrary action. The Alabama Court asserts that in the *Alton Case* the purpose of the compulsory pension plan was not to "stabilize industry or the business of railroads"; that the pensioners did not occupy such relation to the economic fabric as that "to give them (the pensioners) purchasing power, would * * * affect the business of the railroads."

The distinction is without reason. This remote benefit, from expenditures filtering back from the public, affords no foothold for the exaction, for it is stripped absolutely of any off-setting benefit in a constitutional sense. The Alabama plan is obviously more remote both as to benefit and regulatory responsibility than was the plan for a pool retirement system adversed in the *Alton Case*.

In that case a single homogeneous industry was regulated by the pension tax. Here the regulation pools every variety of seasonal, periodic and heterogeneous employer for a tax to maintain an unemployment relief fund for some of the ex-employees of the group.

Here the scheme is removed from the bar of Section 23 of the State Constitution only by the assertion of the Alabama court that the purpose intended is general economic stability, state-wide, indeed nation-wide in character, so diffused as to

have merely an atomic effect on the employers who are made to pay for it; and no effect at all not shared by everybody in the State.

In the *Alton Case* the agencies "regulated" by the retirement tax were instrumentalities of interstate commerce. Here, no element or function of the business of appellee or of the vast majority of employers subject to the tax is claimed to threaten the public welfare or to require or justify regulation in respect to any element or relation of the business itself. There is no evil *inherent in their manner of doing business* or *inherent in their business itself*, to be eradicated. The evil to be eradicated is not employment but unemployment; a function not of employment but of society. The employers are the last members of society who can be charged with responsibility for unemployment. The only fault charged is that all of those taxed were guilty of employing more than eight persons, for more than 20 weeks, during the year 1936 and must therefore assume the burden of unemployment relief.

If they discharge all of their workers except seven or reduce the working time to nineteen weeks (which the act does not attempt to prohibit and in fact invites) then they are no longer taxed.

Appellee asserts that the scheme is *in all its aspects* a capricious imposition of a public burden upon a group singled out arbitrarily for the purpose.

(c)

Such benefits as will accrue to Appellee and the taxed employers will be merely the general benefit which may result to the public at large from general spending by the detached unemployed who draw the benefits.

Referring to the exaction or contribution levied upon the employer (Sec. 4-a) and the supplementary tax upon the employe (Sec. 4-d) the Alabama Court asserts (emphasis supplied):

> "The exaction of the tax on them both in the same Act is an excise tax on the coordinated business of employment looking to the end of helping them both *and the people generally.* * * *

Of course the controlling element in that statement rests in the final words, for the Court could not assert on the record before it or as a matter of judicial knowledge that improvement of the purchasing power and social morale of miscellaneous scattered unemployed persons would, on the average, help any employer taxed any more tangibly than it would help the citizens or businesses in the State not contributing to the donation. Common knowledge, the facts before the Court (on demurrer or motion to dismiss) in that case and proven here oppose any such suggestion. The finding below opposes it*

The Alabama Court makes plain that the Act recognizes that the evils of unemployment affect alike *all employers* and *all members of the public;* thus:

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*Finding 9, R., p. 180.

"Extensive unemployment depreciates consumer purchasing power, and tends to demoralize a large class of citizens and to stimulate crime, disorder and social degradation."

The opinion does not contend that this depreciation of purchasing power, and tendency toward crime and degradation of ex-employes will affect the group selected for the tax any more adversely or directly than it will affect non-taxed employers or the general public. Nor does the opinion suggest that former employers, remote, mesne or proximate, are in any wise responsible, or subject to be declared legally responsible, either for the unemployment or its consequences.

The foregoing quotations constitute a judicial determination by the Alabama Court that the purpose and intent of the Alabama Act is that the benefits are expected to extend to the employer class (and, indeed, to the public) *generally*, not merely to present employers of 27% of the labor of the State selected for the tax; for the opinion asserts that "all employers will benefit *on a horizontal basis.*"

The only conceivable method by which all employers in Alabama, or all taxed employers, will benefit on a horizontal basis is by reason of the fact that all citizens and all industries in the State will benefit on a horizontal basis, the taxed group included.

The Alabama Court was confronted with Section 23 of the State Constitution (supra) and the due process warning of *Railroad Retirement Board v. Alton R. R.* To avoid those impediments that Court was forced to discern in the scheme a public purpose for state-wide increase in the spending power of the unemployed in order to stabilize general economic conditions in the State. Otherwise the purpose was private, the exaction barred by Section 23 and the taking without due

process. This is necessarily true because there was and is no aspect of the relation between any given employer and his present employes which authorizes the Legislature of Alabama to mandate a blind increase in wages, in the form of unemployment insurance or otherwise. So, there must be a general or state-wide scheme.

As thus construed, the rationale of the Alabama Act affords no constitutional basis whatever for singling out employers of a fraction of the labor in Alabama to bear the burden of avoiding for the general public the consequences of "depreciated consumer purchasing power", "crime, disorder and social degradation," for which the employers taxed can under no theory be charged with responsibility.

The burden of ameliorating those calamities affecting all alike can not be laid upon a selected group.

(d)

The State's argument as to off-setting benefits in a waiting labor pool was not sustained by the Supreme Court of Alabama and is disproven and untenable.

The argument that the administration of the scheme will in the future confer benefits upon the employer class sufficient to off-set the tax, in a constitutional sense, was predicated by the State below upon the notion of a "pool of unemployed," which, it was urged, will be held at home while the unemployment benefits are being paid, thus awaiting reemployment.

That theory was given no support whatever by the Supreme Court of Alabama, which referred only in the most inclusive terms as to class benefits and, indeed, sustained the Act as a public tax measure because of the general public

benefits, carrying horizontal benefits to all employers, which the Court discerned in its tendency to afford purchasing power and sustain the morals of the unemployed.

To the State's — not the Alabama Court's — suggestion as to special or off-setting benefits inherent in the theoretical pool of labor we reply:

1) A system which levies today for a benefit supposed to begin two years hence, but by Federal command is subject to repeal as to appellee at any time without trust, refund or accountability, is not a fair or reasonable or constitutional equivalent for a present taking or classification.

Notwithstanding the amendment which excluded groups previously subject to the Act, the defendants demanded payment of the levy by those groups for the period up to the amendment (January 1 — April 20, 1936), thus making plain, as a matter of current administrative interpretation (Bill, Sec. 6, R. p. 6), that the distribution of benefits two years hence, when the benefits become operative, will not be regarded by the State authorities as having any bearing on or as reserved in trust, or otherwise, for the theoretical benefit of any particular employer or group which may at this time be subject to the tax.

2) The facts proven and the findings of the Court below disprove the reality of any such supposed benefits.

3) These further conclusions are obvious on this record:

Maintaining a pool of oyster-tongers in Mobile County during the off-season for that occupation, or a pool of cotton-seed oil workers during the offseason for those workers,* is

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*4 R. p. 118, fol. 155.

obviously remote in distance and without even a molecular effect upon the business of making paper in Tuscaloosa County or that of a fire insurance broker in Birmingham. Such illusory "benefits" can find no justification under the long established requirement of the decisions that a benefit supposed to offset a class assessment or justify a class-tax or police assessment must be special, tangible and direct to justify the taking or the classification. Where off-setting benefits are relied upon they must in their equivalence be obvious on the face of the regulation or assessment or the scheme must provide machinery for determination whether the benefits in fact reasonably justify the exaction. If not, the fact will be subject to judicial determination, and, where there is no provision for adjustment to meet the facts, the levy can not be sustained. *N. C. & St. L. Ry. v. Walters,* 294 U. S. 413.

Such assumed benefits as may hereafter result are conferred indiscriminately upon all employers as members of the general public, and are so general or social and remote as to fall beyond the settled requirements of the Constitution for an off-setting benefit tax.

In *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, Mr. Justice Holmes conceded for the Court the principle of offsetting benefits as upon occasion justifying a taking. Thus:

> "It is true in *Plymouth Coal Co. v. Pennsylvania,* 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359 it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws."

But in that case the Court declined to admit that the general benefit of maintaining streets in a city above the coal seams of the owner of subjacent minerals was sufficiently direct or special to offset the damage incident to a statute prohibiting the working of the seam beneath such streets, without compensation to the owner of the coal. Obviously the maintenance of public thoroughfares and "excess pools" of workers and housing for workers and streets in the vicinity of mining operations carries social advantages. But they were not direct, offsetting or equivalent to the threatened taking; and palpably not sufficient to have justified a classification taxing the mines and excluding, as here, the general mass of taxpayers experiencing like benefits from the treasury burden.

Here, bear in mind, the proposed taking is annual and perpetual, for an advantage denominated an "excess-labor pool," existing in assumption and not in any tangible or provable sense whatever.

The most recent analysis of a so-called off-setting benefit contention by a State in support of a regulation is the opinion annulling the Texas gas proration orders delivered February 1, 1937, by this Court in *Thompson v. Consolidated Gas Utilities Corp.* 81 L. ed. (Adv.) 270

The local assessment cases cited and recognized by the Court in the *Thompson Case* as appropriate analogies to alleged off-setting benefits under a regulatory gas proration statute leave, we believe, no possible answer to our contention on this point. That line of cases is well illustrated by a case upholding the right to *judicial determination of off-setting benefits* where the burden of the improvement imposed was challenged as so arbitrary and unreasonable as to violate due process. We quote from *N. C. & St. L. R. R. Co. v. Walters,* supra p. 415:

> "The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably."

The Supreme Court of Tennessee was held in error for failure to consider the charge that the levy outweighed the benefits, in these words:

> "Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State in imposing upon the Railway one-half of the cost of the underpass was arbitrary and unreasonable, the Supreme Court obviously erred in refusing to consider them" (ib., p. 415);

and this Court asserted with reference to the exertion of the police power:

> "But when particular indviduals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. * * * While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment, so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them" (ib. p. 429).

The same principle applies to exactions of this nature. The "evil to be eradicated" at the expense of a particular group must be that for which they are responsible and the "advantages to be secured" must be a real equivalent when accomplished through a direct assessment or a taking.

The benefit which may justify a levy for a public purpose solely on the theory of off-setting benefits must not only be fairly equivalent but must be direct and tangible and in addi-

tion to the general benefit accruing to the public. Otherwise, if the benefits are merely those general benefits which accrue to the taxpayer, the classification, which singles him out and is defended solely because of benefits supposed to be peculiarly applicable to the group singled out for the tax, loses its validity.

(e)

The unavoidable implications of the Alabama exaction upon an employer group are basically untenable.

An exact analogy would be a proposal to tax all husbands for a fund out of which to pay alimony to divorced wives, regardless of their need, in order that they be assured of spending money during a waiting period, both as an aid to trade and to preserve their social morale.

A like analogy would be a widows fund, levied directly upon husbands over forty-five and disbursed without reference to the need of those who become widowed after 1937.

Conceding for argument as much public purpose in such measures as in the present Act, it is clear that all such bypassing of the checks and balances protecting the appropriation of public funds, all such "washing of hands" of responsibility of the State by passing the burden directly to the exaction group, constitutes the most dangerous menace which in its entire history has been unloosed on industry and business in Alabama by the "direct action" opinion of the Supreme Court of that State. This is particularly true, as here, where the shifting of public responsibility deals with the vast problem of indigent or depression relief arising out of unemployment.

There is the certainty that at every session of the legislature pressure groups will be on hand to enlarge the tax, increase the distribution and extend the period of benefits.

There is not even an atomic indication in the opinion of the Supreme Court of Alabama that there is any limit in the State Constitution or within that Court's conception of the 14th Amendment to break the syphoning of funds from employers for unemployment relief. Meanwhile the provisions of the State Constitution and its general laws safeguarding the expenditure of taxes* are thus by-passed and ignored.

The opinion of the Alabama Court indicates no faint conception of the precedent or its final and ominous implications.

> "If the body of persons to be benefitted is numerous, the greater is the influence that may probably be brought to bear to secure such an appropriation of the public money." *Kingman v. Brockton*, 153 *Mass.* 255, 26 N. E. 998, 11 L. R. A. 123.

Where the money appropriated is not out of the public treasury but directly out of the pocket of the employer into a fund for the eligible unemployed, falsely clothed as a contract right, the endless result is as obvious as it will be disastrous.

If the tax to provide a maximum benefit period of 26 weeks and a maximum benefit of $15 per week is to be sustained as improving in the public interest the spending power and morale of the unemployed, obviously 52 weeks at $30 per week would produce greater spending power and greater protection of morale.

If the tax is valid as a tax as written, the legislature is the judge of the amount and there is no recourse available to

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*Infra; Subsec. (f)

the employers of Alabama (except to the conscience of pressure groups which now control legislation in America) against the indefinite syphoning of industrial assets directly and indefinitely into unemployment relief, or any other public objective, free from the traditional checks which protect appropriations from the public treasury.

The scheme of direct assessment to which the Alabama statute and Court propose to subject selected employers is essentially arbitrary and so contrary to the traditional methods of meeting a public expenditure as to justify recourse to the 14th Amendment.

The people of Alabama have not been willing to enlarge constitutional debt limits or the authority of the spending agencies to further unemployment relief.* But while they are cautious as to their public funds, this Act now proposes to open the treasuries of a part of industry and business to direct relief not through taxation into the treasury, but by throwing open their reserves to indefinite expropriation in the guise of regulation, or as a pretended offset to asserted but non-existent special benefits.

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*By Joint Resolution (No. 11, Acts Ex. Sess. 1932, p. 12), passed by the House of Representatives August 30, 1932, and by the Senate September 6, 1932, there was submitted to the electors a proposed amendment to the Constitution which included the following clause:

> "Each municipality and each county in the State is authorized to appropriate funds for furnishing relief and work relief to needy and distressed people and to relieve the hardships resulting from unemployment, and any appropriation that may have heretofore been made by any municipality or county is hereby declared to be legal."

This submission followed very general expression of doubt by county authorities and County Attorneys as to the validity of the use of County funds for direct relief. This amendment was submitted to the electors at the election held November 8, 1932, and was rejected by a vote of 82,961 for and 112,001 against the proposed amendment. R., p. 129.

The Federal Government has forced this result upon Alabama, which necessarily enacted the Federal-drawn and Federal-proposed legislation when it saw that otherwise the amount of the pressure tax would be permanently withdrawn from the State.

(f)

The scheme is not only revolutionary and arbitrary but denies to the taxed group the equal protection enjoyed by those who pay taxes into the treasury.

The history of the use of unemployment relief systems to meet the public burden of depression makes plain the extraordinary danger of any mechanism which by-passes the safeguards of the public treasury and syphons directly from the taxpayer to the beneficiary.

The fact can not be ignored that, as asserted by the Alabama Court, this Act is part of a Federal enforced plan directly related to and intended to cushion nation-wide economic depression. The conception of the plan, its enactment, promulgation and administration leave no doubt whatever as to its intended bearing. Nor does the opinion of the Alabama Court. The Federal government or the Federal Board can at any time it may see fit withdraw its approval of a state scheme which does not advance its tax upon the selected groups to provide for more extensive unemployment relief benefits, should the Federal Administration consider that course necessary to deal with continued unemployment.

The State legislature may at will enlarge the tax and the payments.

That is precisely what occurred in the administration of the British Act.

"The British were faced with a choice between improvising an emergency machine for administering unemployment relief and expanding an existing institution to take over the additional load. * * * In the early stages of the depression, the British believed, as we believed in a similar situation later, that the large-scale unemployment was temporary, and that it would be possible to make up current deficits on the next upswing of business. Believing their difficulties short-lived, they were all the more inclined to entrust the extra load to the trained personnel of their insurance administration. In a desperate attempt to stretch the insurance system to feed the hungry unemployed and to prevent violence the government made frequent changes in the law. It was the attempt to adjust unemployment insurance to the pressure of this excessive unemployment for which it had not been designed that brought the scheme into temporary disrepute."—Economic Brief for State of New York in *Chamberlin v. Andrews*, Oct. Term, 1936, No. 49; p. 146.

The mechanism employed in this Act is intrinsically subject to abuse and withdraws or withholds from the employer taxed:

1) the safeguard of a judicial hearing as to the amount of the fund actually required, as to the benefit or apportionment of the burden;

2) the safeguards surrounding the levy, budgeting and appropriation of taxes for the public revenue;

3) the community of interest of all who pay taxes into the treasury against arbitrary appropriations of public funds for individual benefit, including all existing practical checks upon public spending.

This discrimination is violative of due process and equal protection. It denies to the subjects of this levy the privileges and immunities enjoyed by those citizens who are taxed by traditional methods. These concepts are basic to representative government.

A novel and dangerous mechanism for direct social taxation, stripped of conventional safeguards by the by-pass process here employed, can not be regarded as constitutional fair play.

It is a revolutionary device under which the employer group taxed is exposed to indefinite exploitation and by which that group will be forced to importune each legislature for protection from such exploitation.

The employer is, in fact, denied the traditional benefits of representative government in that the customary forms of appropriation and expenditure of his funds are denied him.

Now the question whether the form of government in any state is representative may be a political one, but where a process of taxation or the nature of an exaction is so novel as to generate a substantial doubt, that process necessarily becomes suspect under the due process and equal protection clauses of the 14th Amendment and should be considered judicially in that connection.

It is not representative government for the State to turn the resources of industry over to the unemployed, or to a limited portion of the unemployed.

There is a radical distinction in Alabama between taxes cleared through the treasury and appropriated to public use and exactions short-circuited from the taxpayer to a numerous class of beneficiaries, such as the unemployed.

Treasury funds are protected by Constitutional requirements.*

There also exist for the protection of the treasury dollar, rigid budget requirements (Acts 1932, Ex. Sess. p. 36; Michie's Cum Supp., Section 919) establishing a Comptroller, requiring preparation of a budget recommending expenditures and appropriations, accompanied by estimate of income, etc. In the event of insufficiency of funds there is provision for allotment.

Now none of these aids exist with reference to a syphon act of the character under review.

The appropriation here lasts forever; unlike recurrent appropriation of taxes.

Again, it must be remembered that the constant threat of the Federal Government standing over this scheme, to withdraw approval, provides a constant "something in the nature of a penalty" (Opinion, *Beeland Case*), to induce the State to allow this scheme, as so approved, to stand, unadjusted and the taxed employers unheard.

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*Sec. 72 of the Alabama Constitution of 1901:

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof; and a regular statement and account of receipts and expenditures of all public moneys shall be published annually, in such manner as may be by law directed."

Sec. 73:

"No appropriation shall be made to any charitable or educational institution not under the absolute control of the state, other than normal schools established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house."

An unemployment relief scheme dictated and the funds frozen for two years and indefinitely in the Federal treasury is not under the "absolute control" of the State. See *State v. Sowell*, 143 Ala. 494, 39 So. 246.

All of these consequences establish a glaring disparity in substance and in form between the scheme according to which the employer group is taxed for the relief of unemployment and the method by which taxpayers generally in the State are taxed for public purposes.

Under these circumstances the traditional elements fundamental in the conception of due process are absent.

Due process of law, the equal protection of the law and the equality of privileges and immunities guaranteed by the Fourteenth Amendment require, in favor of those who are compelled to meet public objectives by direct expenditures out of their own pockets, the fair equivalent of those features of taxation necessary to its fundamental justice and to free institutions; certainly the equivalent of the safeguards assured to all who pay taxes directly into the treasury.

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 416;

Railroad Retirement Board v. Alton Railroad, 295 U. S. 330;

United States v. Butler, 297 U. S. 1, 61;

Loan Assn. v. Topeka, 20 Wall, 655;

Cole v. La Grange, 112 U. S. 1;

Parkersburg v. Brown, 106 U. S. 487;

Thompson v. Consolidated Gas Util. Corp., 81 L. ed. (Adv.) 270;

N. C. & St. L. R. R. v. Walters, 294 U. S. 405;

Panhandle E. Pipe Line Co. v. State Highway Comm 294 U. S. 613, 622.

Viewed as an exercise of the taxing power, the Act is arbitrary and prohibited by the 14th Amendment.

Heiner v. Donnan, 285, U. S. 312, 326;
Hoeper v. Tax Commission, 284 U. S. 206;
Schlesinger v. Wisconsin, 270 U. S. 230.

In *Heiner v. Donnan, supra, at p.* 327, the Court said:

> "Such an exaction is not taxation but spoliation . . . . This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty, a new and startling doctrine, condemned by its mere statement . . . . "

In *Hoeper v. Tax Commission, supra*, at p 215, quoting from Knowlton v. Moore, 178 U. S. 41, 77, this Court approved the assertion that a tax which is arbitrary and brings about " profound inequality transcends the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

The entire formula represented by this Act results in a failure to provide methods for the determination of the amount appropriate to be raised, its apportionment and assessment against the group assessed, based upon its sole objective, which brings the scheme into conflict with the 14th Amendment.

That due process which even a tax demands has been thus stated by the Court:

> "It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting

the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."—*Hagar v. Reclamation District*, 111 U. S. 701

Nothing is better settled than that the general system and procedure for the levy and collection of taxes and customary usage, notwithstanding informality of notice, are held to satisfy due process (*Kelly v. Pittsburgh*, 104 U. S. 78, *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 239). By parity of reasoning, when the transfer of a plain public burden to a selected group of citizens is accomplished by a tax scheme revolutionary in type, summary in method, anticipating by not less than two years the use of the fund (meanwhile lending it on open account to the Federal treasury), we assert that due process is not afforded.

Always let it be borne in mind that this Act is the hand of Esau but the voice of Jacob; that the form and substance and object of this Act were initiated and compelled by the Federal Government under the pressure tax levied by Title IX and that the Supreme Court of Alabama admits that there was "something in the nature of a penalty" for not yielding! That is enough.

(g)

The State could not, consistently with due process, impose upon individual employers the duty of insuring their own employes against unemployment.

To seek to impose upon any employer responsibility for unemployment relief after the complete and non-actionable

termination of the relationship would be a clear violation of due process.

As pointed out by the court below, imposing this sort of responsibility by law is merely horizontal wage fixing.*

It would be without reference to any standard whatever, applied indiscriminately to all ages, sexes, classes, salaries. It merely adds to any wage agreed upon and lawful *per se* under the law of the State an arbitrary percentage to be paid without any reference to any known test or standard.

Such interference with freedom of contract; such arbitrary creation of direct responsibility for unemployment finds no justification in any adjudicated test of the 14th Amendment.

This is no statute to further the principle of fair negotiation looking to a contract (*Virginian Railway Company v System Federation No.* 40, *March* 29, 1937).

This is a statute dictating an addition to the final wage, reached after negotiation, which must on this record be presumed to be fair and is beyond the power of the legislature of Alabama to dictate. We do not understand that *Adair v. U. S.*, 208 U. S. 161, is overruled by the *Virginian Railway Company Case, supra,* or by the *Railway Clerks' Case* (*Texas & N. O. R. Co. v. Brotherhood,* 281 U. S. 548). See also *Wolf Packing Co. v Industrial Court,* 262 U. S. 522, 267 U. S. 552; nor do we understand that the *West Coast Hotel Case* was intended in any sense to suggest that a state legislature

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*Of course no such scheme as this Act can take comfort from *West Coast Hotel Company v. Parrish,* (Decided March 29), in which this court sustained a statute under which was established a minimum wage for women, after hearing, in industries in which the wages paid were "inadequate to supply them necessary cost of living and to maintain the workers in health. Any such order might be re-opened."

may by statute add an arbitrary exaction to all wages as this statute, in effect, proposes.

Appellee's business, and the business of the employer group subjected as a whole to the levy of this Act to relieve unemployment, cannot be said to be peculiarly productive of unemployment. The bill avers and the proof shows that Appellee's business is not. We assert that there is no element of Appellee's business of such nature as to justify a State police regulation requiring the business to give indemnity to its individual employes against unemployment, or to pay a tax equivalent to the cost of such indemnity into a State pool, as here.

The opinion of the State Supreme Court makes no effort whatever to suggest that the business of Appellee or any particular employer of the taxed group is subject to regulation in respect to exits, discharges or reemployment of its individual employes, as might conceivably be the case where there might exist deception or overreaching or a form of employment contract oppressive in character. That was the question on which the court divided in *Coppage v. Kansas,* 236 U. S. 1. No such question is involved here.

Where a citizen who, two years before potential application for benefits, is employed by plaintiff, presently leaves the service voluntarily to seek and obtain intervening employment, intending never to return to the original employment, or who is discharged for cause permanently disqualifying him from further re-employment, it can not be asserted that a future subsidy to this citizen and his subsequent un-employment resulting from discharge or exit *from some other employment two years hence,* is a function of the present employment.

Overruled though it is as to the validity of appropriate minimum wage laws for women, we submit that the argument

of the *Adkins Case* (261 U. S. at p. 559) pointing out the necessity that legislation regulating the employe relationships must take into consideration and relate to circumstances within or leading up to the agreement is sound:

> "A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, *and solely with relation to circumstances apart from the contract of employment, the business affected by it, and the work done under it*, is so clearly the product of a naked, arbitrary exercise of power, that it cannot be allowed to stand under the Constitution of the United States." (Emphasis supplied).

We discussed above the lack of due process in shifting directly to a selected group the perpetual subsidy of the unemployed. The following illustrations and decisions make plain the absence of constitutional relationship of the scheme here imposed to the status and relation of employer and employe.

Many things are potential or probable or inevitable *during* employment; illness due to causes other than the service; inadequacy of reasonable wages or salaries to meet the family exigencies of the particular worker; highway injuries and natural death. Financial responsibility for these exigencies, however probable or inevitable during the employment, can not be cast upon the particular employer, or upon employers by indiscriminate groups.

No regulation of the relationship of employer and employe can be sustained which is not directly and reasonably related to the employment. The extreme limit is illustrated by

Cudahy Packing Co. v. Parramore, 263 U. S. 418, in which an injury to an employe while traversing a portion of a public street *necessary to be used to enter the plant* was held to be sufficiently related to the employment to entitle the injured employee to compensation.

So, in *Crowell v. Benson* 285 U. S. 22, 55-56, the Court held that the power of Congress to enact a maritime compensation act depended upon the existence of the relation of employer and employee and, necessarily, could apply only to compensation for injuries arising *directly out of that relationship*. This Act does not remotely propose to relate the unemployment here relieved to the present employment.

The compulsion of payment of unearned money by an employer to a third party can never be a regulation of the relation between the employer and his employe. The employer and employe have agreed, without overreaching, upon the salary or wage. This Act includes the $50,000 executive. To force the employer to recast the salary agreement and provide for his mythical and remote unemployment is arbitrary.

In the Cudahy Case, the Court said:

> "It may be assumed that where an accident is in no manner related to the employment, an attempt to make the employer liable would be so clearly unreasonable and arbitrary as to subject it to the ban of the Constitution;
>
> . . . . .
>
> "The liability is based . . . upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured." 263 U. S. at 423.

On these premises, the Unemployment Compensation Law must be condemned upon the authority of the Workmen's

Compensation cases because it lacks and violates the fundamental basis of intrinsic relationship upon which those cases are rested.

(h)

Owing no duty to insure its own employes against unemployment, none can be imposed upon appellee as to employes of others.

Since in general no duty or responsibility for ordinary unemployment of their own ex-employes can consistently with due process be imposed by law upon individual employers it is the more certain that no such duty or responsibility can be imposed upon selected pools of groups of employers in respect to the aggregate unemployment of their ex-employes as a whole.

The sole argument for the pool liability is that in certain businesses there is great seasonal and periodic variation in employment, resulting in waiting periods; that these businesses can not support unemployment compensation for their own exits; that the pool must therefore be filled by businesses having little or no exits.

That may be a practical argument for pooling; but it is wholly lacking in constitutional validity. The admission intensifies the arbitrary character of the exaction as to those businesses which are not seasonable or highly sensitive to market fluctuation. It lacks even the identity of enterprise which was insufficient to save the Railroad Retirement Act.

The Appellee here is an industry constructed and put in operation immediately prior to the depression which has oper-

ated with no interruptions due to the market or the depression or of such character from any cause as would have created eligible unemployment in any appreciable amount.

When Appellee is pooled in a scheme the rates of which are predicated upon a guess as to the requirements of total unemployment, it necessarily follows that Appellee is forced to contribute on a basis having no reasonable bearing on its own relationship to the creation of employment.

The bill avers the significant life history of its employment in Alabama in these words:

> "Plaintiff avers that the risk of unemployment originating in its own plant is, as to the future, remote and imperceptible, and that the general or conjectural risk of unemployment originating at the plants of other employers is not a function of plaintiff's business or operations such as to warrant legislation by the State of Alabama throwing upon plaintiff the responsibility for and cost of providing directly against such unemployment in either case.
>
> "There is no plant or business in Alabama in which operations, once begun, have been slowed down or employment curtailed as a result of plaintiff's continued operation of its plant and business or as a result of competition from plaintiff.
>
> "On the contrary, plaintiff's continued operation from the beginning has tangibly, continuously and directly contributed to employment in other businesses in Alabama."

(From Sec. 11, R., p. 10).

Under these circumstances the pooling of Appellee in a scheme to provide unemployment relief for the exits from

contractors who work when they have a job, canning plants and cotton gins and cottonseed mills, and like seasonal or fluctuating businesses is arbitrary in the extreme.

The arbitrary character and five year sentence was premeditated. The New York economic brief made plain that the purpose of including the steady employments was to average out, at their cost, the higher cost of a statewide scheme arising out of the fluctuating trades.

(i)

The levy of a flat tax for five years without possibility of adjustment to appellee's business is arbitrary.

Because of the wide disparity in relation to unemployment existing within the group selected for the burden of unemployment relief, the levy of a flat payroll tax for five years without possibility of hearing or adjustment is plainly arbitrary. The Alabama Court's justification of the omission is unsound and is predicated on assumptions as to horizontal benefits disproven on this record.

The above objection to the Act is closely related to the objection based upon pooling.

The opinion asserts that a merit rating is not essential to the Alabama Act *"because all employers will benefit on a* horizontal basis" from the effects sought to be accomplished.

Of one conclusion there is no doubt: that this Appellee and the taxed group are not responsible and can not consistently with the Constitution be made responsible for depression or unemployment cycles.

Let the Court attend to these representative expressions from the argument for the New York Law:

> "Unemployment has its roots in the irregularity of industrial activity and growth and has increased from decade to decade as our economic life has become more complex. In the long run the major causes of this irregularity are traceable to technological, geographic, population and market influences. Complicating and intensifying these long-run influences are cyclical and seasonal fluctuations, evidences of industrial maladjustments which reach their climax in depressional unemployment and business stagnation." (N. Y. Economic Brief, p. 1*).

Now is that the fault of appellants, for which they should be fined 3% of their payrolls; or is it the responsibility of society itself? And here is recognition enough that this Act proposes to solve a public responsibility by casting it upon appellants:

> "The history of public welfare in the United States reflects a steadily growing sense of public responsibility for the relief of unemployment. It also shows that tidal waves of mass unemployment, characteristic of major depressions, usually inundate the regular work of private and public welfare organizations, swamp their available facilities and impair regular provision for chronic dependency." (ib.).

The report admits:

> "The individual business concern operates in the midst of a maze of forces beyond its immediate influence. A New York employer has recently pointed

*Quotations are from brief filed for the State in the N. Y. Court of Appeals. We understand substantially the same brief was filed in this Court.

out that '. . . the individual employer has virtually no control over the markets to which he sells his products. His output, and hence the number of men he can employ, is controlled by conditions almost entirely beyond his control . . . No one is more eager than he to employ a maximum of workers, but in this respect he has no arbitrary power'." (ib. p. 42

and that

"It is clear that unemployment created by technological change and market shifts cannot be anticipated or provided for by individual employers or industries." (ib., p. 61),

and here is the final statement of responsibility: a haze through which the principle of the *Adair Case* can not be discerned:

"Employers releasing workers temporarily should provide at least in part for their maintenance until there is again need for their services. Employers whose businesses are expanding or are expected to expand are equally dependent on this labor reserve on which they will draw. They should regard themselves as equally responsible to help maintain it while on call." (ib., p. 80).

The New York Economic Brief admits the uncertainties as to the ability of the individual plant to pass the tax on to the public:

"The burden imposed upon employers by a 3 per cent payroll tax will obviously depend upon the extent to which they can pass it on." (ib., pp. 85-6).

The Brief enumerates six conditions affecting the ability of the employer to pass it on. For the present, or short run effect, the Brief admits the case for which we contend:

"I. The *short-run* effects of such a tax may be radically different from the ultimate or long-run results. These short-run effects, which depend on the particular economic conditions existing at the time the tax is first imposed, do not allow broad generalizations on incidence." (ib., p. 86).

Assembling the opinions of economists as to the ability to pass on the tax, we find in the Brief no such dogmatic assurance as is advanced by counsel for the State. Certain of the economists indicated that the amount would be taken out of wages, which is prevented by the Alabama Act*, and none of the economists quoted in the brief indicated any thought other than that as an element of added cost it would sooner or later trickle into price; or the plant would trickle into bankruptcy.

What has been stated is sufficient to make obvious that the remote or eventual passing on of the tax is no constitutional equivalent of the present taking from employer for the relief of the floating pool of unemployed in violation of the known and traditional limitations of the Constitution. A direct payment is a direct payment, by whatever casuistic name it is called.

That quotation (supra p. 39) appears contradictory to the recognition by that court, above quoted, that many employers will have no connection with unemployment. It is contradictory unless the Alabama Court means that all employers and all the public will, alike, benefit horizontally and inadmeasurably from alleviation of unemployment, and, accordingly, that there can be no merit rating.

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*No employer shall make or require any deduction from wages to finance the contributions required of him."—Sec. 13 (a).

A sufficient answer to that hypothesis is that the Act does provide for a merit rating—after five years—that Appellee stands ready today to prove the absence of fair prospect of substantial exits eligible for benefits and that the procuring cause of the entire scheme, the Federal Act, by Sections 9 and 10 expressly contemplates the allowance of additional credits on the Federal tax for merit rating (after three years experience—five years payment of taxes under Sec. 910).

In short, the answer of the Supreme Court of Alabama is a palpable evasion of the fact that the denial of merit rating for five years is due, not to the disproven facts asserted by that Court, but to the mandate and penalties of the Federal Act.

It should be noted here that Sections 909 and 910 of the Federal Act are the provsions that give employers a credit on the Federal tax *beyond the amount paid to the State* to the extent of any reduction of their State tax as a result of merit rating; that is, they are given a credit on the Federal penalty for good conduct under State laws. We do not believe that the dissenting opinion in *U. S. v. Constantine, infra*, undertakes to defend a Federal exaction which is reduced for good conduct under a state law, the idea being that it might tax heavily bad (illegal) conduct because of the difficulty of collection.

The Court sought to justify the lack of such cognizance (merit rating) by asserting that there is at present no available data on which to fix the merit rating basis. The Alabama Court said:

> "It is impossible to forecast the extent to which each employer will directly or indirectly contribute to unemployment, so as to put them on a merit rating basis except

by reference to past experience for which there is no available data at the present. And then the situation would be speculative."

That observation is not correct as to Appellee. It is not correct as to a large proportion of employers taxed. The experience of Appellee since the beginning of its operations in 1928 is available in detail* That same experience is obviously available in greater or less degree for every established business in Alabama.

That experience was not available to the Legislature for the purposes of merit rating solely because, as averred and proven on this record, the Legislature did not desire it and made no effort to obtain it.

The same experience-data may or may not be available to every other employer covered by the Act, but if any employer has the proof he is entitled to an opportunity to present it in a judicial or quasi-judicial proceeding. It is hardly an adequate reply to one's assertion of a right, that some may not be able to prove a similar right. It is a strange assertion that a legislature can arbitrarily deny the opportunity to to be heard because it does not know what evidence will be presented.

The available data is not available for the current adjustment of the burden under the Alabama Act because the Legislature has denied to the State Unemployment Compensation Commission any authority to hear employers on their unemployment experience until 1941. That action is due to the "coordination" with the conditions prescribed by the Federal Act, viz., no benefits must be paid for two years [Fed. Act.,

*R., pp. 114-117, 132-136.

Sec. 903 (a) (2)] and, in the case of State pool systems, no credit on the Federal inducement tax is to be allowed for merit rating until there has been three years additional experience [Sec. 910 (a) (1)].

Obviously if merit rating were permitted to reduce the tax imposed by the State Act on any given employer before 1941 (when the good behavior credit is first allowed on the Federal tax), it would avail the employer nothing, since it would automatically reduce the credit on the countervailing Federal tax levied under Sec. 901.

For Appellee, Gulf States Paper Corporation, had the Act been in effect during the period 1930-1936, the testimony (Warner, R. p. 117) indicates that the distribution of benefits to unemployed exits from Appellee's personnel

> "would have been a small fraction of the total levies against the Company and its employes as to workers employed on a hourly basis, and would * * * have been nominal or negligible as applied to plant workers employed on a salary basis, and *would have amounted to nothing for salaried officers in the central office.*"

The Court asserts that the Act looks to an adjustment of the responsibility for unemployment in 1941 and thereafter, five years after the beginning of the tax.

The opportunity for adjustment beginning in 1941 is plainly inadequate. The matter is delegated, without direction, to the Commission. It is limited to an adjustment in any event not lower than 1.5% of the payroll, and must, for all employers *average an arbitrary* 3%. That is not adjustment at all. This is not a tax for the general purposes of or ever to be paid into the public treasury. It is an expropriation from selected employers for the improvement of the gen-

eral purchasing power of the unemployed, supposed to be sustainable because of benefits to the taxpayer group and supposed to be adjustable to employment experience and the relief load — after five years; but the Act provides for neither adjustment of the individual employer's responsibility nor the tax in the aggregate.

The deferring of distribution of benefits for two years and merit rating adjustment for five years, and the reserved (and freely exercised) right to repeal and amend the Act makes the Act arbitrary as to those taxed in the interim on a flat basis to support a future scheme.

(j)

The proximate and controlling effect of the law is the exaction of money for private donations.

The dominant, and proximate and necessary effect of a statute determine its validity under the Fourteenth Amendment and not the remote expectations or remote or secondary consequences of the law. By that test, notwithstanding the state-wide or nation-wide public purpose discerned by the Alabama Court, the Alabama Act is so essentially private as not to justify expropriation from appellee for the unemployment insurance fund.

It is indisputable that the dominant objective and proximate result fix the constitutional characteristics of a law, asserted to violate due process.

Stated differently, a secondary or indirect public advantage does not make a project a public one justifying taxation.

Loan Assn. v. Topeka, 20 Wall. 655;
Parkersburg v. Brown, 106 U. S. 487;
Cole v. La Grange, 113 U. S. 1;
Lowell v. Boston, 111 Mass. 454.

Bearing in mind the remotness of distribution of benefits (deferred for two years as a result of the mandate of the Federal Act), we insist that the remote public advantages discerned by the Alabama Court in the future expansion of purchasing power (for the prosperous as well as the indigent unemployed) cannot be held to be the dominant and proximate characteristics of the statute which determine its validity.

The dominant impact of the Act is plainly private. Hopes, consequential in character, can not overcome the fact that the proximate and direct result of this Act is direct aid to individuals having at the time of receipt no actual relation to any employer subjected to the tax.

Tested by the principle announced in the cases cited, the relief required by this Act will be essentially private in character, and therefore can not, consistently with the 14th Amendment, be imposed upon Appellee either as to its own exits or as to the unemployed generally in the State.

There are no recitals in the Alabama Act purporting to redeem a bad act by a good motive or to conceal the primary object under a misleading statement of intent.

The direct and necessary effect of the State Act is a vague gesture in the direction of unemployment relief but proximately and immediately a series of donations to unemployed persons without reference to need and with the effect and probability of the spending of the benefit wholly speculative.

(k)

The provision for payment of benefits regardless of need is arbitrary.

The requirement of the Act that unemployment relief be payable as of right without reference to the necessity of the unemployed renders the scheme arbitrary and further emphasizes the private character of the proximate effect of the Act.

This Act is not sustained as a regulation of the relation between any given employer and his employe upon the constitutional theory of a minimum wage, but solely as a measure to alleviate the general effects of destitution and social immorality. To a system based on that hypothesis recognition of the need of the distributee is indispensable.

The conception underlying the contract basis, rather than the relief basis, of unemployment relief emphasizes the arbitrary character of the exaction laid upon the taxed employers.

They are forced to meet not only the public obligation to care for actual indigency but to increase the purchasing power of those who may be wholly removed from any need of the donation.

> "State support furnished as state aid indiscriminately to all of these classes, to the needy, and to the well to do, is beyond the power of legitimate legislation. We know of no state legislation where 'state aid' has been granted without reference to disability, necessity, age, or exceptional service. No public purpose is subserved by taking by taxation the property of the many and giving it under the guise of state support to those who are out of reach of its need."—*Beach v. Bradstreet*, 82 Atl. 1034, 85 Conn. 344.

And see Judge Brewer's opinion in *State v. Township of Osawkee*, 14 Kan. 418 (2d Ed. 322.)*

Improving the purchasing power of the needy may be a public objective. Certainly there is no public objective justifying the expropriation of money from A to improve the purchasing power of B, who is in no need of funds to avoid destitution or tendency toward crime or despair.

This is the more obvious since the Supreme Court of Alabama sustains the statute only on the theory that it supplies purchasing power to those *who for the lack of it* are potential drags or menaces. If they do not in fact *need* the distribution, the reason fails.

(l)

The analogies relied upon by the State do not sustain the theory of the Act.

Any analogy drawn from American legislation must necessarily be of little or no assistance here, as no such law has ever been attempted in this country. What we have said with regard to the operation and nature of this law is sufficient answer to the alleged precedents brought forward below and in the State Court, but we notice them briefly here, as some reliance was placed upon them by the Supreme Court of Alabama.

Workmen's Compensation Not Analogous.

What has been said above with reference to *Cudahy Packing Co. v. Parramore* and *Crowell v. Benson*, is sufficient reply to the asserted analogy of *Mountain Timber Co. v.*

*Quoted in the Brief for Appellee in *Carmichael v. Southern Coal & Coke Co.*, No. 724, at p. 91:

Washington, 243 U. S. 319. Moreover, there the Court was careful to point out that the State had made an earnest and careful effort to classify industry according to probability of accidents, setting up 47 classifications, with varying assessments for each according to the danger.

A similar argument based upon that case was rejected in the *Railroad Pension Case*, 295 U. S. 330, 369, 371, with the assertion that no effort at rational classification was attempted in the Railroad Retirement Act. Aside from the matter of arbitrary classification, here there is absolutely no relation between the occasion that gives rise to the gratuity required to be paid and the employment which is assessed, or between either of them and the amount of the benefit.

Workmen's Compensation laws not only predicate liability or payment upon an injury directly related to the employment both causally and in time, but they fix the amount of the award with specific reference to a disability or a need. Here the unemployment is unrelated to the employment which is taxed, is not contemporaneous, and the amount of benefit is not related to need or circumstances.

Deposit Insurance Laws Not Analogous.

The principle of regulation of a business subject to regulation or prohibition by requiring security for deposits, applied in *Noble State Bank v. Haskell*, 219 U. S. 104 is not applicable. The business of making paper in a plant with a record of substantially continuous operation can not be required to indemnify employes of other businesses against unemployment as a condition to the State's consent to its operation at all.

The analogy is sought to be made by the opinion of the Alabama Court between the benefit to banks from deposit

guaranty and the general benefit to employers from this unemployment tax, the theory being that the deposit guaranty tax carried an off-setting benefit in depositor confidence, just as, here, it is said that the Alabama Act upholds "an economic and moral status necessary for their (employers') successful operation." The analogy is grossly unsound.

The receipt of deposits from the public, for use by a bank, is subject to regulation; in fact, as held in the *Haskell Case*, to prohibition.* Each bank could be required, like insurance companies, to impound assets or give bond, as security. The tax for a State fund was presumptively a fair equivalent, less expensive, more easy to comply with, and therefore within the police power of regulation as a substitute for a bond. We do not believe this Court will look with favor upon an open end mortgage of the deposit guaranty type as to industry which is not subject to organic regulation or prohibition.

The deposit guaranty tax was applied to all bank depositaries who took, and used at will, deposits by the public. There is no such inclusiveness here. The putative public benefit from ex-employe compensation and social welfare is not any more necessary to the successful operation of the business of the taxed employees than to the successful operation of any business whatever in the State and the tax here is not a regulation of any business at all or of any liability to any individual or to the public. It is a bald expropriation of

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*"We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. *On the contrary we are of the opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe.*" 219 U. S. at 113.

funds for a general social objective, exacted from a wholly unrelated group.

The exaction is compared to that of the *Head Money* Cases, 112 U. S. 580, sustaining a fee for the relief of indigent aliens. Aliens can be, and are now, excluded entirely, and we would suppose therefore that a tax of fifty cents for importing them could readily be allowed. It is also notable that the money was to be used for the care of the indigent and not distributed generally by way of increasing the purchasing power of immigrants.

(m)

The State Act and the Alabama opinion erroneously assume that the right to employ or be employed is a franchise that may be granted on condition that the parties assume extraneous obligations of the State.

Up to this time the argument has not been advanced before this Court that employment is *per se* wage slavery and that no one should work except for the State.

From that premise, foreign to our system, it might logically be argued that the right to employ or be employed is a privilege which may be withheld absolutely, like a franchise to operate a railway in the streets, or be granted on such terms as the State may impose. That, indeed, is the only theory upon which this law can be sustained, and is apparently the basis upon which reliance is had upon *Noble State Bank v. Haskell, supra.*

The right to employ and be employed is as basic to our system as the right to breathe or live at all, a right so obvious that the Supreme Court of Alabama has overlooked it entirely;

or has confused with a wholly different right, if it may be so termed, viz., the right to look to the government for aid if employment can not be found.

For these reasons we assert that the right to employ or be employed can not under our system be doled out by the Government on condition that the employer or the employe assume directly in connection with the employment some obligation of the State.

There may be regulation, to be sure, relating to the employment itself and not to some extraneous responsibility of the State. We find nothing in *West Coast Hotel Company v. Parrish,* March 29th, to suggest that the natural right to labor (employ and be employed) can be bartered by the State or that the contract of employment may be dictated except in re-respects reasonably appropriate to

> "suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression." *

It is obvious that the Alabama Act is not a regulation of this nature. It superimposes upon the contract of employment a grave but wholly extraneous function of the State, relating, not to the employment but to the duty of the State itself with respect to a *wholly fortuitous* situation (unemployment) intervening and continuing after the complete termination of the employment and existing only because of such termination. In short, by definition it is the antithesis of employment.

**West Coast Hotel Case, supra; Holden v. Hardy,* 169 U. S. 366; *Chicago, Burlington & Quincy R. R. Co. v. McGuire,* 219 U. S. 549, 565, and other cases cited in the *West Coast Hotel Case.*

To maintain under these conditions that the State by arbitrary and conclusive fiat can relate to the employment and read into its terms an obligation relating to a status having no ~~causal~~ or proximate relation to the employment is to throw reason and the Constitution away.

This Act asserts in effect, under the whip of the Federal scheme, that there is an irrebuttable presumption that all unemployment accruing after 1937 arises out of all previous employments to which the taxed employers may have been parties. The statutory implication is necessarily false and its attempt to make the falsehood conclusive is violative of due process.

Heiner v. Donnan, 285 U. S. 312;
Schlesinger v. Wisconsin, 270 U. S. 240;
Bailey v. Alabama, 219 U. S. 219
Manley v. Georgia, 279 U. S. 1.

(n)

The tax upon employes levied by Sec. 4 (d) can not be sustained as a scheme for compulsory self-insurance.

We do not believe that under any traditional theory of the 14th Amendment a requirement that all employes *insure themselves* against remote unemployment can be sustained as a tax-police measure. The theory on which that program is pressed must be that the legislature has determined that all wage workers and salaried employes are inherently improvident or threaten social solvency or are potential destitutes and can therefore be made to take out unemployment insurance.

The conception is alien to all established principles of freedom of contract and due process.

The levy is, moreover, essentially arbitrary as to the employe, for the reason that any future benefit by the employe who pays the exaction is remote, speculative and uncertain. He may never become unemployed. He may, at the time he becomes unemployed, have been working for an employer who employes less than eight and therefore be ineligible. The act might at any future time be repealed, either by the State or by the Congress, which is in effect given the right to repeal the State Act by Section 18 as amended. The right to amend or repeal is expressly reserved and in fact the act has been amended so as to exclude a particular kind of business (railroads) and its employes.

While the employe contribution does not fall directly upon Appellee, Appellee may nevertheless challenge the Act because of the obvious invalidity of compulsory self-insurance against unemployment, for these reasons:

1) The provision can not be segregated. The compulsion is joint and inseparable.

2) The void provision menaces Appellee with continuing suits for invalid deductions from wages.

3) The provision for the tax and its distribution emphasizes the fact that the "benefits" are not primarily or directly intended for the employer sufficiently to classify him for the tax.

(o)

The Alabama Supreme Court clearly holds that the employer and employe tax levied by the Act and the purposes for which it is set aside are inseparable parts of a single objective.

We can not be in doubt under the opinion of the Alabama Court that (1) the employer tax [Sec. 4 (a)], (2) the employe tax [Sec. 4 (d)], and (3) the benefit provisions are inseparable. The objective and administration of the Act are relied upon by the Court to sustain the validity of the classification or benefit, both as to employer and employe.

Certainly the tax can not be sustained as to the employer and void as to employe, and vice versa, since the Legislature can not be presumed to have levied a tax for a supposedly rational objective in double the amount of the public need which alone is said to justify the classification or benefit.

(p)

The number and weeks classification of the State Act, which excludes more than seventy per cent. of the employe population of Alabama, is plainly arbitrary as related to the objective of the Act.

The Circuit Court of Appeals in the pending case of *Chas. C. Steward Machine Co. v. Davis, No.* 837, speaking through Sibley, J., a member of the three-judge court below, held that the numbers (8 employe) classification of Title IX of the Federal Act did not make the Federal Act

invalid as a *tax* measure, although arbitrary from the standpoint of unemployment relief regulation as held in this case.

That Court (CCA) did not consider the double classification also involved both in the Federal and State Acts.

As we have pointed out with reference to the State Act, the measure, although in the form of a tax statute, is not in fact a revenue act, as admitted by the Alabama Court, and must be weighed as a regulatory or benefit-tax from the standpoint of determining the exceptions which may be made from the employers to be subjected to the burden.

On this point the court below found and held:

> "The main classification is between employers of eight persons or more and those of less than eight. Some employers and employees are now by litigations opposing the law on the ground that it is arbitrary to include in the burdens and benefits of the law employers and their employees where there are eight employed and to exclude where there are only seven or six. No reason for the difference thus made appears. It is suggested that very small payrolls would not yield much contribution nor pay to bother with. But from the employee standpoint the need of protection is not less because he works with fewer employees, and from the public standpoint the unemployment of a number of persons carries the same menace whether they formerly worked for large or small concerns. It is evident that six or seven high salaried employees would cause a much greater payroll than a dozen or fifty day-laborers. No reason is found for the inclusion alone of employers of eight or more persons; nor why less than all should be included. If a store having seven employees is com-

peting with one having eight, it is manifest that the former can undersell the latter, and the latter must discharge one employee or go broke and discharge all eight, equalizing wage reductions being forbidden." Finding No. 8, r. p. 180.

"If an insurance Act like this could stand up which either covered all employments (not excepted for valid reasons), or which classified employments so closely as to escape arbitrary imposition of burdens (see Mountain Timber Co. vs. Washington, 243 U. S. 219), the present Act denies due process in that the classification of employers having eight or more employees is entirely arbitrary. Whether viewed from the standpoint of employers or employees there is no reason for the distinction made, and equal protection of the law is not afforded either to employers or employees. Colgate vs. Harvey, 296 U. S. 404, 423, 425."—Conclusion No. 4, R. p. 182

This question was not discussed and apparently not considered by the Alabama Court. The inference from the opinion is that any class of employers selected wholly at random may be required to provide unemployment relief for the benefit of "unemployed in that class." Just what that means is not clear. The unemployed belong to no class. There are charges upon and the responsibility of the public precisely because they are unemployed by any person. It is wholly arbitrary to ascribe them to the 8-worker 20-week class of employers, any more than to the farms or the other exempted or non-taxed employers who account for more than 70% of the workers of Alabama.

The opinion of the Alabama Court that the Act is valid only because the objective is general (indeed, national) improvement in purchasing power and morale on part

of the unemployed, thus stablizing market demand essential to all employers, makes plain that the classification of this statute, *as related to that end,* is grossly arbitrary.

The distinction between 8 or more and less than 8 is wholly capricious if, as is the case, the small units which fold up seasonally and in depressions and notoriously represent the marginal problem, contribute so heavy a percentage to the problems of unemployment that to exempt them merely singles out the taxed groups to carry the burden for all. The small firm employes exempted are estimated at 102,400, farm and other exempted labor, 648,845, and employes of the taxed group, 275, 175 (Affidavit of Halfpenny, R., p. 75).

Considered in the light of the Alabama Court's theory that the general effect of unemployment is the justifying objective and that the trickling of relief funds into trade (along with improved morale) constitutes the reasonable remedy, there is plainly no reason for singling out arbitrarily a minor group for the gesture.

Note particularly that the Act exempts employers, no matter how many workers they employ, who work less than 20 weeks (38.4% of the year). What reason can be advanced for any such arbitrary factor? Certainly not the unemployment involved.

The fault with the Alabama Court's conclusion is that it justified the act on the ground of general unemployment relief and straightway forgot that objective.

We therefore contend as the court below held, that the classification of numbers and weeks is wholly arbitrary in exempting those employers in businesses identi-

cal with the businesses included, who employ less than eight or operate for less than twenty weeks.

Classification of industries for regulation as to health and safety or conditions *within the particular plant* may well be predicated on size, as reflected in the number of employes, or may for various discernible reasons except small units. See ca. ci. by Brandeis, J., dissenting, in *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, 42; *Ward & Gow v. Krinsky*, 259 U. S. 503; *McLean v. Arkansas*, 211 U. S. 539, etc.

Here the regulation is of unemployment relief, not health, safety, morals in a particular work group. "The classification bears no reasonable or just relation to the intended result of the legislation"*

The problem considered, the number and weeks limitation of the Alabama Act can not be sustained.

**Louisville G & E Co. v. Coleman*, 277 U. S. at p. 39.

PART II

THE ALABAMA LAW IN ITS RELATION TO TITLES III AND IX OF THE FEDERAL ACT IS VIOLATIVE OF THE ORGANIC DUAL BASIS OF THE AMERICAN SYSTEM AND VOID.

We quoted the assertion, conclusive here, of the Alabama Supreme Court that the Alabama Act is expressly, functionally and intrinsically dependent upon the Federal Act; that its purpose is abortive without the Federal Act, that the tax-credit provisions of the Federal Act stood "in the nature of a penalty" against failure or refusal by the State to adopt the Act; that "the Alabama Act ties into it (Federal Social Security Act) and forms a part of a nationwide economic scheme *provided for by the Federal Act,*" that the Alabama Act is tied into the Federal Act "in a way necessary for it to have an effective field of beneficial operation."

These expressions by the Alabama Court are but judicial declarations of the express and intrinsic acceptance of the Federal Act subject to all of its mandates, terms and conditions by the Alabama Act, viz: "to coordinate this State and its institutions with the plans and purposes of the Federal Government as expressed in its said Security Act"—Sec. 10 (e), Acts 1935, at p. 962.

This statutory and judicial declaration is accompanied by conformity at every point and in every detail with the Federal Act.

The judicial interpretations of the State Act and its organic relation to the Federal Act must, of course, be accepted here "as if the meaning had been specifically expressed in the enactment." *Morehead v. Tipaldo,* 298 U. S. 587; *West Coast Hotel Co. v. Parrish, supra.*

We proceed, accordingly, to examine the validity of the State Act, on its admitted and adjudicated relation of complete and unconditional acceptance of the Federal Act in all of its terms, conditions and implications:

The basic facts relied upon to show the functional and intrinsic dependence of the State Act upon the Federal Act and (if the latter were valid) upon continuing administrative approval and financial support of the Federal Act and Board, as well as the sweeping delegation of funtion, include in addition to the express statutory acknowledgement above quoted, the following:

1) The Federal Act was intentionally and structurally devised, publicly proclaimed by the President and the Committees of Congress in its formulation and enactment, and by the Federal Social Security Board in administering it, as the foundation unit in a Federal-State system of unemployment insurance, the success of which depended upon the adoption of approved State Acts.

2) The tax-credit device was intended to exert economic pressure upon all states for the adoption of unemployment insurance Acts in form and substance comply with the Federal pattern, which dealt with matters of material legislative discretion and importance.

3) This device is recognized by the Alabama Court as in the nature of a penalty for not complying and has obviously that character.

4) A basic objective of the Federal Act was to obtain control and use by the Federal Treasury of the State Unemployment Compensation funds, as open account loans or for investment in Federal securities, as the Secretary of the Treasury might in his sole discretion de-

termine. Sec. 303 (a) (4); Sec. 904 (a). At the present time the Treasury is taking into open account about $40,000,000 per month from this source against the current (February, 1937) monthly excess of expenditures over receipts of $300,000,000.

5) The Federal proposal and State acceptance withholds and freezes, by necessary consequence of the provisions of both Acts, and the contract nature of the deposit, the State funds in open account in the Federal treasury, for a minimum period of two years before any withdrawal by the State is permitted, and permanently thereafter except as withdrawals may be made for the sole purpose of payment of benefits [Title III, Sec. 303 (3) (5)].*

6) The objective of Titles III and IX of the Federal Act set out a plurality of express conditions to which State systems must conform in order to obtain the administrative aid of the Federal Board (carrying Federal approval and therefore control of administration by the

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*Obviously the State could not successfully maintain a suit for the recovery of its own fund except pursuant to its administrative distribution upon benefits.

(The open account, I. O. U., or due bill nature of use authorized by the Secretary of the Treasury in the soaring Federal deficit now cracking the price of Federal securities and threatening the solvency of investing institutions makes it certain that no State has the right to commit itself firmly in this manner as to the use of moneys held by the State for an alleged public purpose.

The Supreme Court of California, confronted with a requirement of its constitution prohibiting the withdrawal of public moneys from the State, weaseled its way by assuming that the Secretary of the Treasury would arrange for the deposit of California's contribution in Federal depositaries in California—and did not consider the question of surrender of sovereignty and responsibility here involved. *Gillum v. Johnson*, Pac. (2d) (Cal.).

States) and in order to qualify state employers for the credits uner Title IX (Sections 902, 909, 910.)

7) The State Act repealed all appropriation for maintenance or administration [Sec. 17 (Acts 1935, at p. 967), as amended (Acts 1936, at p. 180)] and left the administration of that Act wholly dependent upon the discretion of the Federal Board in making allowances under Title III, Sec. 302 (a).*

8) Sections 909 and 910 of the Federal Act penalize for five years the allowance of merit-rating under any State Act, in that no credit for improved rating is allowable under Sec. 909 until after 1937 or under 910 until after 1941 [three years after beginning of benefits, which can not begin before two years—Sec. 903 (a) (2)]. Yielding to this situation the State Act abandons all merit rating until 1941, a circumstance which is argued, *supra*, as plainly arbitrary; none the less so because compelled by the Federal Act.

9) Formal federal approval of the State Act by the Federal Board is necessary**

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*Because of this dependence, all salaries and organization of the State Commission and its entire budget and personnel are dependent upon the approval of the Federal Board. The record on this appeal by the State from a final decree adjudging the State Act invalid could not be printed by Appellants (the Attorney General and State Commission) until on March 25th the consent of the Federal Social Security Board was obtained to print the record, after initial refusal followed by several weeks of importunity by the Attorney General of Alabama in the effort to comply with the understanding that this case and No. 724 would be appealed by the losing party to expedite prompt determination of the questions involved.

**Senator Glass' caustic characterization of this audacious process was stated in his address of March 30 in these words:

"With federal regulatory bodies in every community of the states and federal bureaus in Washington bursting the bounds of marble palaces and

10) The subjection of the State Act to express, functional and intrinsic dependence upon the *validity* of the Federal Titles. Acts 1936, at p. 180 (Sec. 5½); Acts 1936, at p. 228-9.

11) The Federal Act is an offer. The State Act an acceptance. The State Act has been approved by the Federal Board. The offer, the acceptance and the approval constitute a contractual subordination by the State of its sovereign processes to the Federal Government.

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overflowing into business houses and private homes, and with the states required supinely to submit their legislative statutes to the approval of bureaucratic boards here before they can get back a pittance of the prodigious sums from the pockets of their people in the form of taxes, state rights, as well as the security and independence of private enterprise, are fast disappearing."

They were provoked by the argument on behalf of the Attorney General and others that Thomas Jefferson's historic dissatisfaction with the Supreme Court was a precedent for the pending effort to extend without limit the power of Congress and the Executive over all local affairs and concerns deemed in their aggregate or statistical effect to be a matter of national economy. One of the latest and now most timely expressions of Thomas Jefferson is the following:

"Take together the decisions of the Federal court, the doctrines of the President, and the misconstructions of the constitutional compact acted on by the legislature of the federal branch, and it is but too evident, that the three ruling branches of that department are in combination to strip their colleagues, the State authorities, of the powers reserved to them, and to exercise themselves all functions foreign and domestic.

Under the power to regulate commerce, they assume indefinitely that also over agriculture and manufactures, and call it regulation to take the earnings of one of these branches of industry, and that, too, the most depressed, and put them into the pockets of the other, the most flourishing of all.

Under the authority to establish post roads, they claim that of cutting down mountains for the construction of roads, of digging canals, and aided by a little sophistry on the words 'general welfare,' a right to do, not only the acts to effect that, which are specifically enumerated and permitted, but whatsoever they shall think or pretend will be for the general welfare.

And what is our resource for the preservation of the Constitution? Reason and argument? You might as well reason and argue with the marble columns encircling them.

The representatives chosen by ourselves? They are joined in the combination, some from incorrect views of government, some from corrupt ones, sufficient voting together to outnumber the sound parts; and with majorities only of one, two, or three, bold enough to go forward in defiance.

Are we then to *stand to our arms*, with the hot-headed Georgian? No.

12) We quote in the margin* the aggressive warning of the Federal Board that if the Legislature of Alabama adopted H. B. 78—12-4-36 (Dominick), providing for the holding of the contributions to the Alabama Fund in that State Treasury until determination of the validity of the Act, the Federal Board would withdraw its approval of the Alabama Act for certification of credits under Title IX or grants under Title III. This threatened action would have disorganized or terminated the administration of the State law and subjected the employers of Alabama to a loss of credit on the Federal tax for 1936 alone approximating $2,000,000.

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*On December 4, 1936, there was introduced in the Alabama Legislature and referred to the Committee on Judiciary, House Bill 78, by Mr. Dominick of Tuscaloosa. This bill proposed to amend Section 4 (d) of the Alabama Act so as to provide for the temporary impounding of the contributions paid into the fund in Alabama within

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That must be the last resource, not to be thought of until much longer and greater sufferings.

If every infraction of a compact of so many parties is to be resisted at once, as a dissolution of it, none can ever be formed which would last one year. We must have patience and longer endurance then with our brethren while under delusion; give them time for reflection and experience of consequences; keep ourselves in a situation to profit by the chapter of accidents; and separate from our companions only when the sole alternatives left, are the dissolution of our Union with them, or submission to a government without limitation of powers.

Between these two evils, when we must make a choice, there can be no hesitation. But in the meanwhile, the States should be watchful to note every material usurpation on their rights; to denounce them as they occur in the most peremptory terms; to protest against them as wrongs to which our present submission shall be considered, not as acknowledgements or precedents of right, but as a temporary yielding to the lesser evil, until their accumulation shall overweigh that of separation.

I would go still further, and give to the federal member, by a regular amendment of the Constitution, a right to make roads and canals of inter communciation between the States, providing sufficiently against corrupt practices in Congress, (log-rolling, etc.,) by declaring that the federal proportion of each State of the moneys so employed, shall be in works within the State, or elsewhere with its consent, and with a due *salvo* of jurisdiction. This is the course which I think safest and best as yet."

—To William B. Giles, Dec. 26, 1825. Definitive Ed. 1907, Vol. XVI, p. 146.

(a)

A State may not contract or delegate away its legislative power nor any function of its sovereignty, even to the Federal government; nor lawfully connive at the assumption of non-federal powers by the latter.

Whether the above stated principle be based upon the illegality of any contract or attempt on part of the Federal Government to violate the Ninth and Tenth Amendments, undertaken or connived at by the State; or whether the conclusion rests upon Art. 4, Sec. 4, guaranteeing a republican form of State government carrying the traditional conceptions of state sovereignty in our dual system, or whether it rests, like the immunity of governmental agencies, functions and processes from taxation or interference by the other government, upon the comity necessary to that dual system, the State may not, consistently with the Constitution, contract, delegate, barter

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the State until the determination of the constitutionality of the State and Federal Acts. Before this bill could be reported out by the Committee, its author was handed the following telegram from the Director of Unemployment Compensation of the Federal Social Security Board:

"WESTERN UNION

"BM 1 84 38 GOVT 2 EXTRA PNA PENSACOLA FLO
DEC 9 PM 2 38

JACOB L KAUFMAN DIRECTOR UNEMPLOYMENT
COMPENSATION COMMISSION 623 ADAMS AVE
MONTGOMERY ALA

ADOPTION OF PROPOSED AMENDMENT TO SECTION FOUR DEE ALABAMA COMPENSATION LAW HOUSE BILL NUMBER SEVENTY EIGHT DASH II WILL PREVENT CERTIFICATION ALABAMA LAW FOR TAX CREDIT AND GRANTS UNDER TITLES THREE AND NINE SOCIAL SECURITY ACT

WAGENET DIRECTOR WASHN D C"

away or abandon any of its sovereign powers, such as the legislative power or other function of its sovereignty or public responsibility.

The Supreme Court of Alabama has in the past fully recognized this inhibition, but we are in doubt where it now finds itself, as we are unable to follow the thread quoted below to any conclusion other than that the State may not delegate its legislative decision to another State but may to Congress. That seems so plain a solecism that we hesitate to interpret the language:

> "The contention is that we cannot allow other governmental jurisdictions to legislate for us. Whether that principle would apply to congressional legislation, since Congress can legislate in an effective way in Alabama, we need not here declare. We can not make our legislation dependent upon that of other States. * * * We have often held that an act complete in itself may be made to depend upon some contingency for its operation. * * * Such contingency cannot be the legislative enactments or administrative regulations of another state. * * * We see no reason why an Alabama statute may not be made to depend upon the validity of an existing act of Congress into which it is tied * * *"—Opinion of Supreme Court of Alabama in Beeland case.

The contention here as to abdication of sovereignty goes far and basically beyond the narrow question of dependence of the State statute upon the contingency or fact (viz., validity or existence) of the Federal Act, adjudicated by the Alabama Court; a conclusion we do not attack.

The point made here is that if the Federal Act could be held valid, the State has by the admitted tie-in, accept-

ance in toto and dependence, abdicated its sovereign responsibility and legislative discretion.

We assert here that as a matter of Federal law, no such delegation or abdication as is accomplished by this Act is permissible for the Federal Government to seek or exercise or for the State to grant.

The General Principle

This principle is firmly established in the nature of our dual system:

In *Texas v. White*, 7 Wall. 700, 725, the Court said:

> "It may not be unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."

In *Collector v. Day*, 11 Wall. 113, 125, the Court stated:

> "It would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax."

These principles were recognized and applied in *Ashton v. Cameron County etc. Dist.*, 298 U. S. 513, in which the Court held that the States may not avoid their constitutional

responsibilities by granting any permission necessary to enable Congress so to do for them:

> "Neither consent nor submission by the States can enlarge the powers of Congress. None can exist except those which are granted. U. S. v. Butler, 297 U. S. 1. The sovereignty of the state essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation. See U. S. v. Constantine, 296 U. S. 287.
>
> "Like any sovereignty, a State may voluntarily consent to be sued; may permit actions against her political subdivisions to enforce their obligations. Such proceedings against these subdivisions have often been entertained in federal courts. But nothing in this tends to support the view that the Federal Government, acting under the bankruptcy clause, may impose its will and impair State powers—pass laws inconsistent with the idea of sovereignty. (p. 531).
>
> * * * *
>
> "The difficulties arising out of our dual form of government, and the opportunities for differing opinions concerning the relative rights of State and National Governments are many; but for a very long time this court has steadfastly adhered to the doctrine that the taxing power of Congress does not extend to the States or their political subdivisions. The same basic reasoning which leads to that conclusion, we think, requires like limitation upon the power which springs from the bankruptcy clause" (p. 532).

We do not understand that the conclusions of the majority met with any dissent insofar as they asserted that the sovereignty and legislative responsibility of the States could not be contractually abandoned and that the

constitutional powers of Congress could not be enlarged by consent or agreement.

There is, of course, a sharp distinction between the contractual delegation or fixed abandonment of a sovereign trust or responsibility, such as the police power or the responsibility for public funds, and the waiver expressly or by acquiescence of immunities not necessary to the preservation of the Federal framework.

Familiar instances of acquiescence involving no transfer or contraction of state authority relate to taxation by one or the other governments of items which, upon objection, would be immune under *McCulloch v. Maryland,* 4 Wheat. 316; also affirmative consent by Congress or consent by inaction, to the exercise of local, not Federal, power in relation to matters which Congress could withhold or withdraw from State action under the Commerce Clause. The State in such cases does not act by virtue of any delegation of power. "In such cases consent may preserve a Federal balance otherwise threatened with derangement" (Cardozo, J. dissenting in *Ashton v. Cameron County, supra,* 298 U. S. at p. 540).

In this case, the appellee and employers singled out to bear alone the public burden of unemployment relief, conceive that the function of legislation upon the subject, actual freedom to deal with the huge fund, actual freedom to provide for merit rating, are sovereign and non-delegable functions and responsibilities, as to which the State itself under our Federal system rests under "the duty of the parens patriae to keep faith with those who have put their trust in the parental power"—*Hopkins Fed. S. & L. Asso. v. Cleary,* 296 U. S. at p. 339.

In the early case of *Pollard v. Hagan,* 3 How. 212 (1845) the Court pointed out the inappropriateness under

the Constitution of grants by the State government to the Federal government of any function of state sovereignty. Speaking of the States' jurisdiction over the navigable waters of the State (subject only to the commerce clause); the court said:

> "And if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because, the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted" (p. 223).

And again,

> "No compact that might be made between her (Alabama) and the United States could enlarge or diminish these rights"—at p. 229.

Familiar illustrations of this principle are:

L. & N. R. Co. v. Mottley, 219 U. S. 467,

Norman v. B. & O., 294 U. S. 240.

While State acts purporting to punish violations of NRA have apparently been invalidated because of obvious violations of the State constitution (*Darweger v. Staats* (1935), 196 N. E. 61, 267 N. Y. 290) such delegations of legislative or other sovereign function to the federal government are squarely within the identical principle, which prohibits any such assumption of State authority or delegation of its own legislative power by the Federal Government.

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 164
Panama Refining Co. v. Ryan, 293 U. S. 388
Schechter Poultry Co. v. U. S., 295 U. S. 495
License Tax Cases, 5 Wall. 462
U .S. v. Constantine, 296 U. S. 287.

(b)

The usurpation of State function intrinsic in the Federal Act and the illegal acquiescence by the State by the adoption of the State Act are destructive of the Federal balance and void.

The summary appearing earlier in this title set out certain of the important respects in which the State by "coordinating itself and its institutions with the plans and purposes of the Federal Government as expressed in its said Security Act" has effectively impaired its legislative freedom of action in respect to unemployment relief and the custody of public funds.

The reasons why this surrender has been made are catalogued by the Alabama Court and are conspicuously inadequate to sustain the action. That court asserted:

> "It would be useless, perhaps, for one state to try to effect economic security in respect to a situation which knows no state boundaries * * *
>
> "* * * an Alabama statute * * tied (into an act of Congress) in a way necessary for it (the Alabama Act) to have an effective field of beneficial operation * * * "The Alabama Act is dependent upon the constitutionality of the Federal Act * * * ,

If the scheme can not function without nation-wide acceptance by the States, no one can fail to recognize that

the Federal Act does supply, as its authors and Congress intend by the tax device that it shall supply, the pressure to induce the States to adopt the State units.

We discuss later, under the title dealing directly with the Federal Act, the nature of the penalty device. Here it is sufficient to point out that the Alabama Court recognizes, in the final paragraph of the majority opinion, that the only expedient to avoid the payment by the State's employers of the full amount of the tax to the Federal government (without unemployment compensation) is to enact a "satisfactory" law:

> "There is therefore something in the nature of a penalty for not doing so."

The Court added its view that this fact of penalty in the Federal Act does not invalidate it, "if the whole plan is within Congressional power;" but it is not and can not be within Congressional power to induce and to assume the surrender of State sovereignty implicit in the State and Federal Acts and their administration.

The State Act is not only an act of unlawful yielding to an unlawful Federal penalty, but an unlawful contraction of the State's legislative discretion and abandonment of control of the State's public funds for fixed (2 years) and practically permanent handling and use by the Federal Government.

In consideration of the nature and purpose of the penalty, it is to be noted that the United States as *amicus curiae* in the Court below argued the suasion of the tax penalty device in these words:

> "To make it possible for States to adopt their own unemployment compensation laws Congress

provided in Title IX of its act for a credit of 90% against the Federal tax for contributions made to state funds created under state laws."—p. 7, per Robert H. Jackson, Assistant Attorney General.

In short, Congress permits, makes it possible, for the State to adopt an unemployment compensation law! For Congress by a penalty device to make possible that which is none of its business, is in fact, on this record, to compel.

The question whether the Federal Act is itself invalidated by the penalty device is a federal question, but the question whether the device was regarded by the State in the enactment of the State Act as a penalty is a question we consider concluded by the opinion of the Alabama Court.

Here regarded solely from the standpoint of the State Act, we assert that the adoption of the State Act under and subject to any such conditions, and subject to the dominant control stated, and as an expedient to avoid punitive consequences to its citizens, is obviously inconsistent with the sovereignty of the State.

All of the surrenders of sovereignty and contractual responses and submissions catalogued above work a violation of the dual system of the Constitution, either by direct abandonment by the State of its own sovereign powers or by statutory connivance by the State in the assumption of powers by the Federal Government which directly violate the Tenth Amendment. The conclusion in either or all events is that the State Act, which works that result, is void.

PART III.

TITLES III AND IX OF THE FEDERAL SOCIAL SECURITY ACT

Titles III and IX of the Federal Social Security Act constitute a scheme for the control of functions beyond the Constitutional powers of the Federal Government and are void.

(a)

Should the Alabama Act be considered otherwise valid and effective as to Appellee, it is indispensable to determine whether it is operative in view of its express, functional and intrinsic dependence upon the validity of Titles III and IX of the Federal Social Security Act.

(b)

The Social Security Act was conceived and finally drafted and its legislative purpose fully proclaimed before recent controlling decisions of this Court adverse to the use of the tax-credit device to induce local action.

The Federal Social Security Act was approved August 14, 1935, five months before the decision in *U. S. v. Butler*, 297 U. S. 1 (January 6, 1936) warned Congress against ostensible taxes constituting a direct part in a system of rewards to induce results beyond Federal Power; and also before the decision in the *Coal Code Case* (*Carter v. Carter Coal Co.* 298 U. S. 238, May 18, 1936), in which the Court condemned an Act built, as here, upon an ostensible tax (with

credit for compliance with stipulated standards relating to production) as a penalty to force compliance with conditions not justified under the commerce clause and therefore void. The Bituminous Coal Conservation Act, with this tax-credit device, was gestating at the time of the tax-credit device of Title IX and was enacted into law on August 30, 1935, fourteen days after Title IX received executive approval.

The Railroad Retirement Case, 295 U. S. 330 (May 6, 1935), condemning as non-federal and in violation of the Fifth Amendment a compulsory pension and retirement pool for carriers subject to the Interstate Commerce Act, was decided after all organic steps in the formulation of the Social Security Act, although before final passage.

These organic steps were:

—The President's initial message on the subject of social security, June 8, 1934.

—Report of President's Committee on Economic Security transmitted to Congress with the President's Message of January 17, 1935, H. Doc. No. 81, 74th Congress, 1st Session.

—Draft and introduction of H. R. 7260 and favorable report by *House* April 5, 1935 (Report No. 615, 74th Cong., 1st Sess.), and by *Senate* May 20, 1935 (Report No. 628, 74th Cong., 1st Sess.)

All before the decisive cases above stated.

These documents, referred to briefly below, are in themselves conclusive that the theory and structure of the Act were conceived without reference to the principles announced in the three cases cited.

The President's Message was admittedly in discharge of his responsibility under Art. 2, Sec. 3 of the Constitu-

tion to recommend to the Congress "their consideration of such measures as he shall judge necessary and expedient." That message, accompanied by the report in full, summarized the recommendation of the Committee and constitutes an organic factor in the interpretation of the resultant measure.

> "Federal action is necessary to and conditioned upon the actions of States. . . . In order that the necessary State action may be taken promptly it is important that the Federal Government proceed speedily. . . ."

With specific reference to the subject—not of taxation but of unemployment compensation—the Message stated:

> I recommend the following types of legislation looking to economic security:
>
> "(1) Unemployment compensation.
>
> * * *
>
> "With respect to unemployment compensation, I have concluded that the most practical proposal is the levy of a uniform Federal payroll tax, 90 percent of which should be allowed as an offset to employers contributing under a compulsory State unemployment compensation act. The purpose of this is to afford a requirement of a reasonably uniform character for all States cooperating with the Federal Government and to promote and encourage the passage of unemployment compensation laws in the States. The 10 percent not thus offset should be used to cover the costs of Federal and State administration of this broad system. Thus, States will largely administer unemployment compensation, assisted and guided by the Federal Government." (Message, p vi).

The report of the Committee attached to the Message but elaborates this Executive statement with the statement that the purpose of the tax-credit device was to remove "the unfair competitive advantage that employers operating in States which have failed to adopt a compensation system" etc (p. 3, 4).

That the provisions of the Federal Bill were regarded as constituting *an unemployment compensation system* can not with intellectual integrity be denied. (Senate Report, p. 16). Who supposes that the President had anything else in mind? Are his analyses false pretenses? The administrative interpretation of the Act by the Federal Social Security Board is that "the entire plan of unemployment compensation is a co-operative Federal-State system."

So, the House Report, referring to the subject, not of taxation or revenue, but "unemployment compensation," opens the report on Titles III and IX with the statement that a method must be devised to deal with the problem, and that the bill "makes possible" State unemployment compensation systems (p. 7); that "Titles III and IX seek to encourage States to set up such systems *and to keep them from being handicapped if they do so*" (ib.); that the bill *permits* the States' discretion with respect to unemployment compensation laws. "Yet the Federal Government, under this bill, has important functions to perform in order to make it possible for the States to have unemployment insurance laws and to facilitate their operation" (ib., p. 9). *"It equalizes competitive conditions through the imposition of the employment excise tax provided for in Title IX"* (ib., p. 9). And that is the sole connection in which any mention is made of taxation in connection with those titles.

The Senate Report likewise (p. 10) dealt with Titles III and IX under the heading "Unemployment Compensation" and not taxation. Both reports discussed in detail the theory of unemployment compensation, to be made payable as of right and not on a needs basis.

The following excerpts from the Senate Report are sufficient to leave no question as to the design and purpose of the Act:

> "This bill does not set up a Federal unemployment compensation system. What it seeks to do is merely to make it possible for the State to establish unemployment compensation systems and to stimulate them to do so. This objective is carried out through grants-in-aid to the States (in title III) for the administration of unemployment compensation laws and through the imposition of a uniform pay-roll tax on employers (in title IX) against which a credit is allowed for contributions made by them to unemployment compensation funds set up pursuant to State law.
>
> "The rate of the Federal tax is 1 per cent for the year 1936, 2 percent for 1937, and 3 percent in 1938 and thereafter. No tax will actually be payable, however, until 1937. Against the tax a credit is allowed up to 90 percent of the tax for contributions to State unemployment compensation funds, which are established under laws which meet the conditions prescribed in section 903. * * *
>
> "This tax offset device is modeled after the provision in the Federal estate-tax law, under which a credit is allowed up to 80 percent of the Federal tax of amounts paid under State inheritance-tax laws. With a uniform tax and this offset device, employers in all States will be put in an equal competitive position. No State can gain any advantage through fail-

ing to establish an unemployment compensation system. This provision will equalize competitive conditions and thus enable States to enact unemployment compensation laws without handicapping their industries.

These frank recognitions of the inseparable relation between Titles III and IX and their common purpose to induce state action were delivered at a time when it was confidently believed that form was dominant over purpose and that the form of a tax, with or plus an appropriation, could reach any objective.

This attitude was induced or the same state of mind illustrated by the extraordinary opinion rendered by the present Attorney General of the United States to the Senate Committee while the bill was under consideration, to the effect that:

> " * * * in passing upon the validity of a statute which on its face, purports to be a tax measure, the courts will not consider the question whether the motive of the legislative body was some other than that to raise revenue. * * *
>
> "It necessarily follows that the fact that the taxes sought to be imposed by the Social Security Bill may constitute an inherent part of a legislative scheme for old age benefits and unemployment insurance, in no way detracts from their validity."—Con. Rec. Vol. 79, Part 5, Col. 2, line 42, p. 5782.

Where it is plain from the face of an Act of Congress, its necessary and proximate effect, or from the legislative history of the statute that its dominant purpose is to accomplish objectives beyond the power of Congress by means of a tax device, with credit for yielding to con-

ditions imposed, the statute can not be sustained although the statute may in fact produce revenue payable into the general treasury.

McCulloch v. Maryland, 4 Wheat. 316, 423 (1819);
Veazie Bank v. Fenno, 8 Wall. 533, 541;
Pollock v. Farmers Loan & Trust Co., 157 U. S. 429;
Hammer v. Dagenhart, 247 U. S. 251 (1918);
Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922);
Hill v. Wallace, 259 U. S. 44 (1921);
Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924);
Linder v. U. S., 268 U. S. 5 (1925);
Trusler v. Crooks, 269 U. S. 475 (1926);
United States v. One Ford Coupe, 272 U. S. 321 (1926);
Magnano Co. v. Hamilton, 292 U. S. 40 (1934);
Railroad Retirement Board v. Alton Railroad, 295 U. S. 330;
United States v. Butler, 297 U. S. 1.

The proposition is no longer debatable, that neither the taxing power nor any other power of the Federal government can be used as a ~~driver~~ device to accomplish non-federal aims, where those aims are judicially discernible.

(c)

The dominant purpose, characteristic and effect of the tax-rebate device of Title IX is manifestly coercive to force the establishment of unemployment insurance systems within all the States, participated in and in substantial respects controlled by the Federal Government.

1) The tax-rebate device violates the Fifth and Tenth Amendment and can not be split in parts, as the tax plus the

credit constitute the effective means to accomplish the coercive result, wholly non-federal in character. The portion of the so-called tax designed to equalize production conditions throughout the United States does not have revenue for its primary objective, since the purpose of Titles III and IX succeed only where the credit is claimed and the revenue is lost, a phase documented below.

Railroad Retirement Board v. Alton R. R., 295 U. S. 330;
Carter Coal Company v. Carter, 298 U. S. 238

2) From the standpoint of federal revenue and federal powers the credit device has no reasonable relation to the taxing power, since it operates according to arbitrary conditions and with a discrimination wholly unsupported by any rational system of classification *based on federal revenue as an objective.*

The credit device is well related to a system of unemployment insurance but not at all to the collection of revenue.

Linder v. United States, supra.

3) That the combination of tax and credit is coercive in purpose and result is no longer open to argument.

Carter v. Carter Coal Co., supra;
U. S. v. Butler, supra.

4) Of course, the social welfare of employees in private business through compulsory unemployment insurance is no function of the Federal Government.

Railroad Retirement Board v. Alton R. R., supra;
Carter v. Carter Coal Co., supra.

5) Congress has no power to draw to the federal treasury the compensation funds of a State, nor to administer or invest them under any such extraordinary delegation of power as is required by the basic provisions of the Federal Act and yielded by the State.

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149;
Ashton v. Cameron County, Supra.

6) Nor can the federal government use its processes to enforce or supplement the enforcement of State laws.

Constantine's Case, 296 U. S. 568, 572.

(d)

The Credits allowable under Title IX for good conduct under a State law are conclusive evidence that the dominant purpose of the title is not revenue but the establishment of unemployment insurance systems within the States.

The credit and additional credit provisions have no possible relation to a true revenue measure. They have a direct and logical relation to the unemployment insurance system. They are obviously inseparable from the tax, since it is the device of the tax plus credit that brings into existence the State units without which the stated objectives of Titles III and IX would fail of their organic purposes.

The function of these credits is seared in the record beyond pretense or duplicity.

With reference to the base credit allowed by Sec. 902 and the additional credits for good behavior (merit rat-

ing) the Message of the President (transmitting the report of his Committee on Economic Security) asserted:

> "Against the tax imposed in the Federal law, a credit, up to 90 percent of the tax, should be allowed for the money the employer has paid to the proper State authority as contributions for unemployment-compensation purposes pursuant to State law. *These credits, however, should be permitted only if the State is cooperating with the Federal Government in the administration of unemployment compensation,* expending the money raised solely for benefits, and is depositing all contributions as collected in an unemployment trust fund in the United States Treasury, as hereafter recommended.
>
> "If a State, to encourage stabilization of employment, * * * allows lower rates of contributions to employers not having such individual accounts on the basis of their favorable experience, an additional credit beyond the amount contributed in a particular year may be granted in the Federal act." (H. Doc. No. 81, 74th Cong., 1st Sess., p. 15) (Emphasis ours).

This provision, accordingly, related solely to unemployment insurance and wholly unrelated to taxation (*Linder v. United States, supra*), stamps this statute for what it is, a statute for the administration of a Federal-State unemployment compensation system.

(e)

The report of the President's Committee on Economic Security which determined the form and substance of the Act, accompanying the Message of January 17, 1936, leaves no doubt possible as to the dominant purpose and rationale of Title IX, as an unemployment compensation and not a tax measure.

We do not believe that it will be possible for counsel representing the Government of the United States in a cause in which a taxpayer claims sanctuary under the Constitution before this Court to pretend that the dominant objective of Title IX is not unemployment compensation rather than taxation or to argue to this Court that the tax-credit device is in fact a true tax.

These quotations from the President's Message (Report of Committee: supra) are conclusive:

> "We believe that the States should administer unemployment compensation, assisted and guided by the Federal Government. We recommend as essential the imposition of a uniform pay-roll tax against which credits shall be allowed to industries in States that shall have passed unemployment-compensation laws. Through such a uniform pay-roll tax it will be possible to remove the unfair competitive advantage that employers operating in States which have failed to adopt a compensation system enjoy over employers operating in States which give such protection to their wage earners.
>
> "We believe also that it is essential that the Federal Government assume responsibility for safeguarding, investing, and liquidating all reserve funds, in order that these reserves may be utilized to pro-

mote economic stability and to avoid dangers inherent in their uncontrolled investment and liquidation. We believe, further, that the Federal act should require high administrative standards, but should leave wide latitude to the States in other respects, as we deem varied experience necessary with particular provisions of unemployment compensation laws in order to conclude what types are most practicable in this country." (pp. 3-4).

Now, wide latitude permissive from the Government is not the complete and sovereign responsibility mandated by the Constitution.

> "Some European unemployment insurance systems are voluntary, but the experience everywhere has been that compulsory coverage is necessary to include a majority of the industrial workers." (ib., p. 9)

The Alabama system includes less than 27% of the workers of the State.

The reason why a needs or means test was not included in the standard act promoted by the Government thus appears:

> "After an unemployed worker has exhausted his right to benefits, European systems generally permit him to draw extended benefits, on a means-test basis, for additional periods, the entire cost of which is borne by the government. As we have stated, such extended cash benefits seem to us far less desirable than work benefits and we recommend that an employee, after he has exhausted his contractual rights, be certified to the authorities in charge of the Federal-work program as entitled to a work benefit." (ib., p. 9).

"Unemployment compensation should permit such a worker, who becomes unemployed, to draw a cash benefit for a limited period during which there is expectation that he will soon be reemployed. This should be a contractual right not dependent on any means test." (ib., p. 11).

The extraordinary lack of any sense of inhibition in the Constitution reflected in the report and in the Act is made plain:

"Some economists urge that, instead of using a tax on pay rolls, unemployment compensation should be paid through Federal Government borrowings to be repaid hereafter out of other types of Federal taxes. Without expressing any judgment on that contention, we deem it desirable, at the present time, to employ a pay-roll tax for unemployment compensation, although it may be possible that experimentation under the proposed statute will show that at some time in the future a plan built upon the other alternative suggestion should be substituted, in whole or in part, for that which we are proposing." (ib., p. 12).

And so, the recommendation of the Message and the Committee translated directly into the statute as enacted, was for the time being, for a Federal-State system *insuring* uniformity, forcing disclaimer of vested rights and compelling reservation of right to repeal, so that the transition to an exclusive Federal system might be made easy. The concluding sentence in the following quotation is a complete demonstration of surrender of sovereignty involved in the articulation of State and Federal statutes so readily acknowledged by the Alabama Court:

"This background, it seems to us, is an important consideration in determining the type of unem-

ployment compensation legislation to be recommended. It clearly suggests the desirability of permitting considerable variation, so that we may learn through demonstration what is best. This we believe, can at this time best be secured under a cooperative Federal-State system, which permits variations in State laws but insures uniformity in respects in which uniformity is absolutely essential.

"A federally administered system of unemployment compensation is undoubtedly superior in some respects, particularly in relation to employees who move from State to State. This presents a problem involved in State administration which we do not at this time know how to solve, although we do not regard it as insoluble and recommend that it should be made one of the major subjects of study of the Federal administrative agency. We recognize also that in other respects State administration may develop marked inadequacies. Should these fears expressed by the champions of a federally administered system prove true, it is always possible by subsequent legislation to establish such a system. We recommend that it be expressly provided in the Federal act that all States must include in their statutes provisions to the effect that those acts shall not be deemed to create any vested interests preventing modification or repeal and that a similar reservation of power be made by the Federal Government. *Accordingly, the Congress can at any time increase the requirements which State laws must fulfill and may, if it sees fit, at some future time, substitute a federally administered system for the cooperative Federal-State system we recommend.* (Emphasis supplied). (ib., p. 13).

The Committee thereupon expressed the idea that *for the time being*, the Government leave the States with primary responsibility *for administration* but:

"Federal cooperation is essential, because the States cannot establish systems of unemployment compensation with reasonably favorable conditions unless there is assistance from the Federal Government. So long as there is danger that business in some States will gain a competitive advantage through failure of the State to enact an unemployment-compensation law, few such laws will be enacted. *This obstacle to State action can be removed only through the imposition by the Federal Government of a uniform tax (rate of contribution) on all employers throughout the country, so that no State will have an unfair advantage. We, therefore, recommend legislation which will impose a uniform Federal tax on pay rolls, with an offset permitted to any employer who contributes to an unemployment-insurance fund under a compulsory State law.*" (ib., p. 14). (Emphasis supplied.)

(f)

Not only does the Federal Act by Title IX coerce but by Title III it purchases the establishment and maintenance, subject to Federal approval, of State Compensation Systems and the custody and control of State funds.

That the Act both coerces and purchases is not to be doubted. We quote below the formal admission before the Court below by the brief for the Government that the Federal Act accomplishes direct participation as a result of the provisions for credit and the diversion of the State funds to the Federal treasury.

Coercion

The Supreme Court of Alabama has spoken for that state: "There is therefore something in the nature of a

penalty for not doing so." Beeland Case. The express, functional and intrinsic dependence of the State Act upon the Federal Titles is no less conclusive than the adjudication of dependence by the Alabama Court.

The national character of the coercion is established by the public declarations, State by State, which have accompanied the efforts of their legislative and executive authorities to escape the credit deadline of Title IX.

The following are representative illustrations of the nationwide recognition of the coercive effect of the tax-credit device and financial aid-control provisions of the Federal Act:

In his message of January 11, 1937, to the **Illinois** legislature, the Governor of that State said with reference to a state unemployment compensation act:

> "There is urgent reason for the consideration of the subject at this time. Failure on the part of our State of Illinois to enact a system of unemployment compensation, will divert from employees in this state to general federal governmental purposes many millions of dollars which would tide them over periods of future unemployment."

The statutes enacted by the States of Kentucky and Ohio respectively, contain the following declarations:

> "Whereas, it becomes necessary to enact an Unemployment Compensation Act in Kentucky before the expiration of the calendar year, 1936, in order to conserve to the citizens of the Commonwealth of Kentucky the benefits of the contributions exacted from Kentucky employers under the Social Security Act, passed by the United States Congress of 1935, an emergency is hereby declared to exist and this Act shall become a law and be effective upon its approval by the Governor."

Sec. 24 (Act. No.... (Senate Substitute for H.-B. 1) Special Session, approved Dec. 29, 1936.)—**Kentucky.**

"This act is enacted as a part of a national plan of unemployment compensation and social security, and for the purpose of assisting in the stabilization of employment conditions. The imposition of the contributions herein imposed upon Ohio industry alone without a corresponding tax imposed upon all industry in the United States would by the penalty upon Ohio industry, defeat the purposes of this act. Therefore this act shall remain in effect only so long as the excise tax upon employers of eight or more persons which is imposed by title IX of the social security act enacted by the congress of the Untied States shall remain and be in effect and operative."

Sec. 34 (House Bill No. 608, First Special Session, approved Dec. 17, 1936)—**Ohio.**

The State of **Texas** asserts an "emergency" to pass the law:

"The fact that Texas has no unemployment insurance system to supplement the Federal Social Security Program creates an emergency and an imperative public necessity requiring the suspension of the Constitutional Rule requiring bills to be read on three several days in each House, and the Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted."

(Senate Bill No. 5, Third Special Session, approved October 27, 1936).

A standard form of cooperation appears in almost all of the Acts, viz:

"In the administration of this Act the Board shall cooperate to the fullest extent with the provisions of this Act with the Social Security Board, created by the Social Security Act, approved August 14, 1935, or any amendments thereto; * * * and shall comply with the regulations prescribed by the Social Security Board governing the expenditures of such sums as may be allotted and paid to this State under Title III of the Social Security Act * * *"

(Ch. 4, L. 1936, as amended by Ch. 125 (H. B. 124) L. 1937, **Indiana.**

Representative excerpts from the various state statutes showing the sweeping dependence of the State Acts.

In the event that Title IX of the Federal Social Security Act, or this Act, shall be declared by the courts to be unconstitutional, inoperative, or void, this act shall terminate and the excises col-

lected as herein provided, or any unexpected balance thereof, shall be returned to the employers and employees who have contributed threto, pro rata, under the direction of the board."

Sec. 26 (Ch. 12, Laws of 1936, as amended—**Idaho**).

"Should the Act or Acts of Congress under which the Federal Government contributes funds to the State for unemployment compensation be repealed or declared unconstitutional, so as to deprive this State or such fund, then the provisions of this Act shall immediately terminate."

Sec. 22 (Act. 768, Regular Session of 1936, approved June 6, 1936.—**South Carolina.**

An extended delineation of the Federal pressure proceeds from the State of **South Dakota** which, because of its length, we carry into the margin.*

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*Whereas, there have been or will be collected by the Federal Government, under the provisions of the National 'Social Security Act,' for the calendar year of 1936, from employers within the State of South Dakota, taxes in an amount exceeding Three Hundred and Fifty Thousand dollars, and

Whereas, The entire amount of the tax provided for under the provisions of that Act for the year 1936 must be paid into the Federal treasury for the general purposes of the Federal Government, without credit or deduction for payments into a state unemployment compensation fund, unless there shall have been enacted by the legislature of this State and approved by the Federal Social Security Board prior to December 31, 1936, a State 'Unemployment Compensation Law,' and

"Whereas, In the event that a State unemployment compensation law is so passed and approved prior to December 31, 1936, employers will be entitled to a credit up to ninety per cent (90%) of the Federal tax for contributions paid into a state unemployment compensation fund to be available for the payment of benefits to workers of this state unemployed through no fault of their own, and

"Whereas, the payment of such compensation to unemployed workers will do much to relieve economic insecurity brought about by unemployment and greatly limit the social consequences of poor relief assistance by the State and its political subdivisions.

"NOW, THEREFORE, an emergency is hereby declared to exist and this act is hereby found and declared to be necessary for

All Acts except New Jersey, New York, Pennsylvania, West Virginia, Wisconsin and Wyoming, in one form or another make application of the Acts depend upon the continuance in effect of the validity of Title IX of the Federal Social Security Act.

We have noted above (p. 67) the threat to discipline the State of Alabama if it enacted a law to withhold the State fund from the Federal Treasury pending determination of its validity. After this brought about the death in committee of H. B. No. 78 (Dominick), counsel representing sundry employers then came to Washington and in conference with representatives of the State obtained the approval of the Federal Social Security Board staff to an amendment which that Board would accept, dictated to the last word by that staff.* So much for coercion.

THE FACT OF PURCHASE OF STATE ACTION IS NO LESS MANIFEST

The credit allowable to employers of the State under Sections 908, 909 and 910 are in themselves bargains between

*H. B. 275—February, 1937, requiring the exactions paid into the State Fund to be returned and the State Commission liquidated on proclamation of the Governor that the tax imposed by Title IX of the Social Security Act, as amended, or any other federal tax against which contributions under this act may be credited has been amended or repealed by Congress or has been held unconstitutional by the Supreme Court of the United States, with the result that no portion of the contributions required by this act may be credited against such federal tax.

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the immediate support of the State Government and its existing public institutions and for the immediate preservation of the public peace, health and safety necessitating immediate action, and this act shall be in full force and effect from and after its passage and approval."

Sec. 25 (Senate Bill No. 5, Third Special Session, approved October 27, 1936.

the state and the Government for the State's acceptance of the Federal program.

That there is purchase of state compliance by the appropriation levied by Title III is no less assured.

The State of Alabama appropriates nothing for the administration of the State Act (Section 17, as amended). To March 31, 1937, the Federal Board had supervised the organization and administration of the State Act by the State authorities and paid to the State Board the sum of $201,187.28.*

To March 31, 1937, the Federal Board had issued to 37 States which had qualified, certificates under Title III aggregating $6,304,941.

These items, however, are small counters in the purchase price.

A large amount of the money paid into the Federal Treasury to March 27, 1937 ($165,111,311.68) to the credit of the unemployment Trust Fund represents credits on the Federal tax. The amount of such *credits* for Alabama alone in respect to the permanent average of 3% mandated by the State Act by 1941 is estimated at over $5,000,000 (R. p. 76, 86).

In respect to wages for the calendar year 1936 the House Committee (H. Rep. 628, May 20, 1935, 74th Cong., 1st Sess. p. 27) estimated the total tax (100%) at $247,000,000, increasing with steps in the rate to $826,000,000 for 1938 and reading $908,000,000 by 1950. The credit offered the industry of the states for compliance with the Federal plan is 90% of these vast annual amounts.

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*FEDERAL SOCIAL SECURITY BOARD—Information Service.

(g)

The objectives of the Federal Act, non-compliance with which is penalized by the tax-credit device of Title IX and compliance with which is purchased by the appropriations made pursuant to Title III, are beyond the orbit of Federal power.

The tax levied under Title IX being demonstrably a penalty rather than a true tax, and the aid extended by Title III being bartered for compliance with the scheme, the tax can be levied and the aid granted consistently with the Constitution only if the federal objective, the creation of state unemployment systems and the control of their reserves and administration, is within federal power and if, moreover, the devices used are consistent with the Fifth Amendment and do not destroy the equilibrium between State and Federal sovereignties mandated by our system.

Admittedly, if the tax-credit device is employed for the purpose of requiring the performance of some function which Congress may compel by penal provision, the tax-credit penalty employed in Title IX may be employed to stimulate or compel compliance. *Head Money Case, Carter v. Carter Coal Co., U. S. v. Constantine, supra.* Otherwise, not.

The question is, accordingly, whether the stated objectives, non-compliance with which is penalized by the tax-credit device and purchased by that device and by the appropriation, are within the Federal power.

APPELLEE HAS PROPERLY RAISED THE QUESTION

No question can exist here as to the right of Appellee to challenge in this suit the constitutional validity of the tax-

device under Title IX and of the appropriation-barter under Title III. The State, as interpreted by its Supreme Court in the *Beeland Case,* has agreed that the State Act must be declared inoperative if either Title III or Title IX be *in fact* invalid. That declaration was not conditioned in the opinion upon any technique as to justiciable remedy, although the remedy of Appellee for declaratory action under the state uniform declaratory judgments act is undoubted.*

Declaratory action in this case, in solution not indeed of a controversy with the Federal officials in respect to the matter, but with the State officials as to the question whether the State Act is operative, was appropriately sought below (Bill, Sec. 33, R. p. 24), as in the *Beeland Case,* in which there was, as here, request both for restraint as well as declaratory action.

As to the tax under Title IX, Appellee of course has a direct justiciable right to test validity either by suit to enjoin on a proper showing of special equities or, in any event, by way of suit for refund. In like manner, since admittedly the State statute under which appellee is taxed, is made operative only by virtue of the Federal appropriation which has been bartered for compliance by the State, if that barter between the State and the national government is in fact disruptive of the Federal balance and violative of the Tenth Amendment and proximately or necessarily results in an exaction upon Appellee, the latter's right to complain of such action by the State and its officials is plain under the State Declaratory Judgments act, for there an undoubted controversy exists as to the exaction and all of its elements and proximate causes. So, in both aspects neither *Massachusetts*

*Alabama Uniform Declatory Judgments Act. Acts 1935, p. 777.

v. Mellon nor *Florida v. Mellon* have bearing upon the question.

(h)

The right to establish or to control the form or administration of State unemployment compensation systems is not a lawful Federal function and can not be coerced or purchased by the Federal Government.

Titles III and IX, whether considered together, as they should be, or considered separately, are in active furtherance and continuing control of state unemployment compensation systems and are beyond lawful federal power.

The bare consideration of the function of a state unemployment compensation system makes plain its peculiarly local nature. As to the State of Alabama, its Supreme Court has decided that the subject is within the police power of the State. *Beeland Case, supra.* The system is either within the State's police power and therefore reserved under the Tenth Amendment or the State act is void under the 14th Amendment and under Sec. 23 of the State Constitution.

That the police power of the State runs far beyond the general subject of unemployment relief before it reaches the national frontier is subject to no doubt.

> *Brush v. United States,* 81 L. ed. (Adv.) 443;
> *Puget Sound L. & P. Co. v. Seattle,* 291 U. S. 619;
> *Jones v. Portland,* 245 U. S. 217.

This broad field of action being within the reservoir of State functions, is reserved, accordingly, from interference from the federal government not only by direct federal parti-

cipation, action, prohibition or penalties (*U. S. v. Constantine, Carter v. Carter Coal Co., Hopkins B. & L. v. Cleary, supra*), but also by the established doctrine of Federal balance which denies to the respective governments any form of taxation, regulation or action tending to impair the governmental functions, sovereignty or existence of the other. Even the expressly delegated Federal power over bankruptcy and incomes, from whatever source derived, yield to this implied negation, greater than any express power because upon it rests the Federal balance. *Ashton v. Cameron County Irrigation Dist., Brush v. United States, Hopkins B. & L. v. Cleary, supra.*

The most fundamental characteristic of the Constitution is the certainty that the police power is not within reach of Federal control, directly or indirectly, by taxation, prohibition, penalty or purchase; and can not be transferred or bartered to the Federal Government.

Thus, however obvious is the affirmative licensing of businesses as a traditional source of public revenue and however broad the power of taxation (limited as to direct taxes to the requirement for apportionment), that great Federal power carries no affirmative right to a federal licensee within State borders. *License Tax Case,* 5 Wall. 462.

We have shown above that the State, while it may in fact stand by and see its rights or its agencies usurped (*Casey v. Galli,* 94 U. S. 673, *Hopkins B. & L. Ass'n v. Cleary, supra*) may not impair its reserved sovereignty by grant or contract. *Pollard v. Hagan, supra;* Part II (a), *supra,* p. 67.

This Court compared the State in our national system, referring doubtless to some historic past, as parens patriae of its citizens charged with the duty of keeping faith with those who have put their trust in the parental powers (Hopkins

Case, *supra*, at p. 340). Here the parens patriae along with thirty six other like parentes patriae are yielding the heritage of their sovereignty and a constitution to the silent corruption of a bribe and a threat which their political agencies have neither the discernment nor the virility to oppose.

If the duplicity of the tax-credit device, plus appropriation-bribe control can draw to the federal government all powers which can thus be bribed or bought, and states can auction off their sovereignty on the block, the end of this republic as a constitutional democracy is at hand.

(i)

The design of the Act relied upon by the U. S. Attorney General below, to bring about the establishment of State unemployment insurance funds and their control and use by the Federal Government is not a valid reason for federal coercion or purchase of State compliance.

We have noted the contention by the United States as amicus curiae in the Court below to the effect that the scheme of the Federal Act includes intent and active participation to create a market for government securities and to control the amount and flow of credit.

The Government admitted *"direct participation by the Federal Government in one aspect of the State Law"*—viz., the conditions prescribed by Secs. 903 (a) (3) and 904; and asserts that in providing a market to that end "Congress has power to adopt such measures as are reasonably necessary to

the execution of its expressly delegated powers." The exact text of the argument is set out in the margin.*

Accordingly, the threatened accumulation of State funds is admittedly actuated by the Federal Government *as an active participant*. Any menace from general liquidation of the funds to meet depression demands upon them is no more tangibly related to a state fund than to depression demands upon the reserves of all business and all people.

Does the Attorney General contend that this economic circumstance confers upon the Federal Government control over every investing and mutual institution whose business is predicated upon reserve investments?

That undoubtedly is the implication, viz., that the government has the power to use any means deemed expedient to control credit.

The contention here confesses a design to invade not merely the reserved jurisdiction of the State but to seize its

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*"But Sections 903 (a) (3) represents something more than the other provisions, for it involved direct participation by the Federal Government in one aspect of the state law. Read together with Section 904, this section in effect provides that credit will be given for payments only under such state laws as stipulate that the funds collected must be invested in certain types of United States bonds. So stated it is obvious that this provision does not involve an arbitrary exercise of the Federal power. It is offering a bounty to those who create a market for government securities.

"Section 903 (a) (3) is designed not merely to encourage investments in government obligations but also to enable the Federal Government to continue its effective regulation of the amount and flow of credit. * * * The accumulation of unemployment compensation funds under the uncoordinated managements of the respective states and their investment in miscellaneous securities would obstruct federal regulation of the amount and flow of credit and lessen federal protection of the market for government bonds. Under these circumstances, Congress has power to adopt such measures as are reasonably necessary to the execution of its expressly delegated powers." (pp. 40-41).

official funds and subvert them to open account use by the Secretary of the Treasury.

That contention is ominous in all its bearings. We challenge it in its entirety.

We concede the broad power of Congress with relation to the selection of fiscal agencies and with relation to its money power, as illustrated by *McCulloch v. Maryland* (1819), 4 Wheat. 316, by the National Bank and the Bank Power, Cases, *First National Bank v. Fellows* (1917), 244 U. S. 416 *Smith v. Kansas City Title & Tr. Co.* (1921), 255 U. S. 180; *Federal Land Bank v. Priddy* (1935), 295 U. S. 229, and by the Gold Clause Cases, *Norman v. B. & O. Ry.*, 294 U. S. 240, and *Holyoke Water Power Co. v. American Writing Paper Co.*, 81 L. ed. (adv.) 383.

But there is nothing in Federal powers to justify the assertion of direct dominion over the savings and reserves of the people standing in whatever currency the Government establishes, except by the exercise of the right of eminent domain and consistently with the Fifth and Tenth Amendments. Certainly the Gold Clause Cases do not go so far. If that suggestion of the Government were sound, it would be idle to say that there is any limitation upon its powers or that there exists any dual system.

In Osborne v. Bank (1824), 9 Wheat., at p. 860, Chief Justice Marshall asserted five years after *McCulloch v. Maryland*:

> "It would be hard to contend that Congress had the power to authorize a bank to carry on a general business if that business were not necessary to the proper functioning of the bank for national purposes"

and in *Veazie Bank v. Fenno* (1869), 8 Wall. 533, the Court said:

> "There are, indeed, certain virtual limitations arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution" (p. 541).

This Court, adverting to a quasi-public agency of the State, a building and loan association, denied the power of the Government to transform, that is, to control, such agencies under its implied powers, even in aid of a delegated purpose:

> "For the purpose of these cases we find it needless to consider whether Congress has the power to create building and loan associations and thereupon to invest them with corporate capacity. As to that we do not indicate an opinion either one way or the other. The critical question here is something very different. The critical question is whether along with such a power there goes the power also to put an end to corporations created by the states and turn them into different corporations created by the nation."—*Hopkins Fed. S. & L. Asso. v. Cleary, supra*, at p. 336.

This Court raised and queried the distinction between Federal powers relating to *banks of issue and deposit* and financial associations established and regulated by the State to encourage industry and thrift.*

Here we have not a bank of issue or deposit, not a quasi-agency of the state but the state itself; we have what the

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*"Distinctions may conceivably exist between the power of Congress in respect of banks of issue and deposit and its power in respect of associations to encourage industry and thrift." ib., at p. 343.

Supreme Court of Alabama tells us is the heart of the police power, unemployment relief, the control of which by the Federal Government would destroy the Federal balance.

The assumption by the U. S. Attorney General that these state funds in their prospective investment and liquidation menace federal credit or financing in such wise as to justify Federal dominion on the interference theory,* is a shocking disclosure of the intent of this administration to establish a totalitarian state in the central government or its executive.

When this Act was coerced (viz. "direct participation by the Federal Government", supra), there was no such fund in Alabama and its accumulation from that State results from the Federal Act. Wisconsin alone had an independent statute. Massachusetts and California had passed statutes in anticipation of the Federal Act then in definite form.

The number of states which have received certificates upon the Treasury for grants under Title III has increased to 37.

As of March 27, 1937, this design had resulted in the enforced contribution or loan by the States to the Treasury of $69,474,242.27 for March (fractional) alone, or at the rate of more than $800,000,000 a year, at the present minimum rates of tax. The total to that date for the fiscal year 1937 is $165,111,311.68. Of this total there has been "invested" $161,647,000 in Treasury IOU'S (termed special obligations under Sec. 904-b).

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*"The theory is that threatened interferences by the State with express Federal powers may be avoided.—*Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352; *Northern Securities Company v. U. S.*, 193 U. S. 197; *Houston E. & W. T. R. Co. v. U. S.*, 234 U. S. 342.

(j)

The tax levied by Title IX is in violation of Article I, Sec. 9, Cl. 4, and Art. I, Sec. 2, Cl. 3 of the Constitution because the tax is a direct tax levied without apportionment upon the basic natural right of having persons in one's employ.

The right to do business in collective or corporate form is a legislative grant accompanied by responsibilities and privileges of the most artificial character, defined by the State. This highly modernized privilege is in no sense a natural or personal right, basic in character and inseparable from the opportunity of existence itself. To tax it out of existence is not tantamount to withdrawal from the citizen of any right to do business at all, although it would shock the sense of justice and propriety. Hence the excise tax on doing business in corporate form sustained in *Flint v. Stone Tracy Co.*, 220 U. S. 107, was not a direct or capitation tax requiring apportionment.

But to tax out of existence the right to labor for another or its necessary correlative, the right to emply others, is to reach so directly the basis of personal existence and survival as to reach the status of a direct or capitation tax which may be levied by the Federal Government only by apportionment under Art. I, Sec. 9, Cl. 4, and Art. I, Sec. 2, Cl. 3, of the Federal Constitution.

There is no distinction from this standpoint between a tax against "having individuals in his employ" and "being in the employ of another" so far as the nature of a tax against either is concerned.

The number of persons gainfully employed in the United States is estimated at 40% of the total population of the United States. Of those not disqualified by reason of age or physical condition or unable to procure it, or serving household functions of the employed or represented by the professions requiring technical equipment, the percentage of employed persons is estimated at more than 90% of the population of the United States.

To tax employment or being employed is, accordingly, to tax that which is as basic to human existence in a free society, as the right to live.

The direct tax on wages of employment levied by Title VIII of the Federal Act without apportionment is of course justified solely by the 16th Amendment, since in the second case of *Pollock v. Farmers L. & T. Co.*, 158 U. S. 601, the Court not only held directly that taxes on incomes from the rent of lands and personal property or upon property solely by reason of its ownership were direct, but asserted that taxes "on incomes from professions, business *or employments*, as well as from offices and places of profit" were among the "*systems of direct* taxation" of many of the states at the time the Constitution was framed.*

A tax on the gain from or expense for personal labor is manifestly as direct a tax upon the basic right to employ or be employed as a tax upon the income from property is direct upon the property. Life itself is labor.

This tax is not levied under Title VIII on the income of employes engaged in any particular or artificial form of labor subject to withholding by the State, but in respect to all forms of labor under all conditions including those clearly beyond

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*158 U. S. at p. 632.

the long reach of the police power; so, the tax on employers under Title IX is against all employers "with respect to having individuals in his employ" in every employment involving 8 or more for the stipulated time. These are, accordingly, taxes upon the most basic form of human employment and are necessarily direct taxes.

Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, 158 U. S. 601; *Knowlton v. Moore*, 178 U. S. 41; Flint v. *Stone Tracy Co.*, 220 U. S. 107. Of course, the Pollock Case repudiated the basis upon which the Hylton and Springer Cases had been decided (3 Dall. 171, 1 L. ed., 556; 102 U. S. 586, 26, L. ed. 253).

Now, is a tax on gross wages received or paid a tax on the natural right to employ or be employed? It obviously is unless, as we have pointed out in Part I, the prevailing notion is to be that all private employment is a species of slavery constituting a joint wrong and should be held as a franchise from the state.

In the *Adair Case* (*supra*, 208 U. S., at p.. 172-3) the Court asserted it was Adair's right, *as part of his personal liberty* to serve his employer as best he could, so long as he did nothing injurious to the public interest; that it was the right of the employer to have business relations with anyone with whom he can make contracts; that the right to purchase or to sell labor is part of the liberty protected by the 14th Amendment, subject of course to the police power:

> "Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor"—at p. 174.

No tax, sought to be justified as an excise tax on the privilege of doing a particular business in a particular

way, is here involved. The condition to the tax is, merely, "having persons in ones employ," whether because of necessity or illness or other disability or for charity or other reason, provided only the employees be eight in number and employed twenty days in twenty weeks.

It was conceded in the argument for the Government in *Flint v. Stone Tracy Co., supra,* that a tax upon the right to buy and sell property *upon an exchange* is an excise tax upon a privilege distinct from the "general natural right to buy and sell property anywhere".

Before sustaining as an excise (indirect) tax the war tax levied upon sales of commodities upon exchanges, the Court was at pains to consider at great length the nature of trading upon an exchange, distinguishing it from ordinary sales of the commodity and holding that the tax was laid upon *the privileges offered at boards of trade* and not upon the business itself or the members of the exchange. *Nicol v. Ames,* 173 U. S. 509. And see p. 521, 522.

Here the tax is directly levied upon the most fundamental charactertistic of employment: "the having of persons is one's employ," regardless of the manner or method. The mere element of number or duration can not be used as a catalyzer to split the bare right of employment into taxable elements.

The tax here is levied at the foundation of the right, without which (having in one's employ) there can be no employment at all. *Bromley v. McCaughn,* 280 U. S. 124, at p. 138.

Stated differently, the right to buy or sell labor or property generally is a basic natural right. To tax the sale or purchase is to tax the right to make it at all. "A

tax on the sale of an article, imported only for sale, is a tax on the article itself." *Brown v. Maryland,* 12 Wheat 419 (444); *Cook v. Pennsylvania,* 97 U. S. 566.

(k)

By reason of the initial and additional credits provided by Sections 902, 909 and 910 the tax levied by Title IX, if regarded as an excise, is lacking in uniformity in violation of Art. 1, Sec. 8, Cl. 1 of the Constitution.

The Government is confronted with the alternative of insisting that compensation systems are made obligatory upon the States by Title IX, thus rendering it invalid, or else that the right to establish credits is delegated to the States, destroying uniformity.

The Estate Tax and Florida v. Mellon, 273 U. S. 12 constitute no answer. In that case there was a bona fide effort to avoid double taxation upon inheritances by credit of fixed percentages of amounts actually paid to the State.

In this case the credits are allowed (Sec. 909, 910) not in the amount of or based upon a percentage of the payments to the State but *in an amount greater than the amounts actually paid to the state* based upon two elements within the discretionary control of two agencies, the State administration which allows credits for good behavior in stabilizing employment under the State Act, and the approval by the ~~approved~~ Federal Social Security Board of the State Act and its administration of the credits for good behavior.

Employers in different states and under different Acts are permitted by the Act to obtain credit in excess of

the 90% of their actual payments to the State fund based upon merit rating established to the satisfaction and in accordance with the determination of state boards.

The origin and purpose of this provision (encouragement of the individual employer to stabilize employment) has been indicated in the quotations from the President's Committee on Economic Security, supra. The provisions plainly subordinate the amount of the credit (and therefore the amount of the tax) not to determinate or judicially ascertainable factors but to discretionary administration of the State Act. That situation does not establish geographical uniformity.

Knowlton v. Moore, 178 U. S. 41, 83 et seq.

The statute is, moreover, lacking in uniformity as a tax measure because the uniformity intended to be accomplished by Title IX is not uniformity of application throughout the United States but uniformity in manufacturing cost based upon *intentional disparity of the tax itself.*

For this reason there is an intrinsic lack of uniformity in purpose.

(1)

Florida v. Mellon, 273 U. S. 12, does not support the contention of the Government as to the tax-credit device.

The history of the estate tax credit leaves no rational doubt that the credit for estate taxes allowed by the Federal Act was predicated upon a willingness of the federal government to withdraw the impact of double taxation from in-

heritances where the States felt it necessary to levy a state tax upon inheritances. The Federal government had no possible objective to subserve in requiring the States to adopt inheritance taxes. The allowance of the credit arose out of the continuous importunity of the States for federal comity in the matter.

No such dominant purpose of federal control could rationally be derived from the history of the act or from its intrinsic terms, as is the case here.

The case of *Florida v. Mellon* was initiated by the State to enjoin collection of the federal inheritance tax imposed by the Revenue Act of 1926 because of the credit provisions. This Court held that the State had no justiciable cause of action. It was not urged that the credit had a coercive effect upon Florida or had been adopted by the Federal government for any such objective or was in fact proximately related to that end. The Court held that the probable withdrawal of citizens from Florida because of the credit was speculative and remote. Moreover, since the Federal inheritance tax was in fact a tax levied unmistakably for general treasury purposes, it is obvious that the right to levy such tax took precedence over any conflicting policy of the State, and the Court so held.

It may be difficult at times to determine whether a tax or a credit is levied to effect and with the direct and proximate result of effecting an unconstitutional purpose, as in the *Child Labor Tax Case*, or is levied apparently or at least ostensibly for revenue as in the *McCray* and *Doremus Cases*. The Court has divided in the past and will divide in the future as to this test.

It is sufficient here to assert that the inheritance tax has been employed traditionally as a source of revenue, produced

substantial revenue both for states and nation, and that the credit was in fact urged by the States in an increasing bona fide desire to avoid onerous duplicate taxation on the same items, transactions or property: a desire in which the Supreme Court has evidenced an aroused and constructive interest.*

The difference between that honest comity and the use of a tax upon pay rolls, accompanied by a credit, to force states to adopt a federal "certified" system of compensation, is obvious.

(m)

The appropriations made by Title III are directly related to non-Federal objectives and are violative of the Federal System.

We take it to be so clear that the appropriations made by Title III are so inseparably related to the provisions drawing control of state functions to the Federal Administration and are so inseparably related to the illegal tax-credit device as not to involve here the question whether the appropriation is *per se* violative of Federal function.

It is sufficient that the taxing power can not be employed to raise or to appropriate money lawfully raised to purchase or enforce the enactment and administration of a state police regulation. *U. S. v. Butler, supra.*

The concession by the Government below that a purpose of the Federal Act was actively to participate in the State function by drawing the state police fund to the Federal treasury should alone remove the appropriation

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*Farmers Loan & Tr. Co. v. Minnesota, 280 U. S. 204, overruling the constructive situs case of Blackstone v. Miller, 188 U. S. 189.

and the validity of Title III from the range of legitimate federal powers.

Title III, as well as Title IX, contains the conditions as to Federal use and control of State police funds; subservience by the States to continuing Federal conditions, subject, after the State has committed itself and its funds to federal custody, to enlargement at any time by Congress so as to "increase the requirements which State laws must fill" (Pres. Com. Report, Supra.)

For this reason there seems no necessity for analyzing the appropriation in the light of the sound decision in *U. S. v. Certain Lands,* 78 Fed. (2d) 684, from the review of which the Government retreated. We content ourselves with the familiar expressions from *Gibbons v. Ogden,* 22 U. S. (9 Wheat) 1 (1824) that *"Congress is not empowered to tax for those purposes which are within the exclusive province of the States,"* and from the *Passenger Cases,* 48 U. S. (7 How.) 283 (1849) at page 446, where Mr. Justice Catron said:

> "Nor has Congress power to lay taxes to pay the debts of a State, nor to provide by taxation for its general welfare. Congress may tax for the treasury of the Union, and here its power ends."

We respectfully refer to the Court's consideration the admirable statement by George Ticknor Curtis (Georgetown University, Feb. 16, 1885) set out in full in one of the other briefs'* which is to our mind unanswerable against the contention for the validity of this extraordinary type of appropriation.

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*For Appellee in No. 724.

The appropriation accomplished by Title III is not the simple appropriation of tax proceeds made under authority of the tax clause. The appropriations here involved are accompanied by continuing control of the functions of an agency of the State's police power.

Under no theory advanced in support of the spending power has it been seriously contended that the power to appropriate carried authority further than the safeguarding of the funds. The power, so far as the tax clause confers power, is functus officio when the appropriation is properly accounted for. If the Federal Government proposes to go further and control or exact obedience to federal command, the Government must justify under some express power clause.

That principle is conspicuously violated here.

An illustration of its application is the retreat from the rate control clauses appended to Public Works utility loans. Realizing that these assertions of dominion of local rates, in the guise of administering a federal appropriation, were untenable a notorious public effort was made to rewrite the record.*

Here the record can not be re-written. It is in the Statute. The appropriation is made part of a bargain for Federal supervision and control, backed up by the threat of disapproval. We have shown how the threat and the appropriation are considered by the States; how the administrative agency, beyond the reach of judicial or administrative remedy even by the State may issue or withdraw certificates of approval under Sec. 903 and certificates of grant under Sec. 302, 303; that it has threatened cancellation if the State withheld its police funds for the reasonable interval of a test of the validity of the system.

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*Duke Power Co. v. Greenwood County, 81 L. ed. (Adv.) 149.

The control represented by the tax-credit device and the appropriation, was accurately analyzed by the report accompanying and recommended by the President's Message which initiated the law:

> "Accordingly, the Congress can at any time increase the requirements which State laws must fulfill and may, if it sees fit, at some future time, substitute a federally administered system for the cooperative Federal-State system we recommend."
>
> Report, accompanying Message of January 17, 1935, at p. 13.

That ultimate result has already been accomplished. It is intrinsic in the Federal Act. It is accomplished by the combination of persuasion and violence of the tax and appropriation clauses and carries, as admitted by the Government below, a designed and direct participation in the administration of the system.

For these reasons, the tax-spending provisions of Art, I. Sec. 8, Cl. 1, does not warrant an appropriation carrying continuing aid and control of a police regulation of the State. Title III is void and the Alabama Act is for that reason inoperative.

(n)

The type of appropriation here involved can have no other result than disintegration of the Federal System.

The type of appropriation here involved, is so inextricably wound up with the surrender by the State of its functions as to be violative of the principle of Federal equilibrium. The repeated quotation from the Report of the Committee on Economic Security as approved and transmitted to Congress is of the gravest significance and illustrates our contention. Acquiescence purchased by

an appropriation is illegal per se and invalidates the appropriation itself but here the Federal participation and control purchased by Title III represents merely the first stage in a reserved opportunity to expand the conditions.

On broader grounds, we assert that the unconditional theory as to appropriations pressed by the Government both as valid and as immune from justiciable attack is necessarily subversive of the Federal balance.

The dual theory is based upon the splitting and decentralization of problems, conceiving that size alone carries them beyond the scope of human capacity.

From the standpoint not of economic or political expediency, but of the Constitution, we assert

1) The contention that it is a function of the general government to assume responsibility for internal economic policies, for local social welfare policies (including the revolutionary plan to throw the burden of unemployment relief upon selected employers) is, in and of itself, destructive of the Federal balance and unwarranted.

2) The assumption by Congress that States may not adopt police regulations of employment and unemployment without Federal intervention is false in fact and constitutionally untenable. The interstate competition between industries removed thousands of miles from each other is not so sensitive as those bent on Federal aggrandizement argue. The opposition of industry to such measures because of fancied competition and effect is mere opposition to the scheme at all.

In any event, the inexorable grasp and assumption by Congress that it must intrude into these domains is

subversive of our system and will concentrate in Washington a magnitude of responsibility with which elected officials and Congress can not mentally or morally cope.

The theory underlying this appropriation is palpably violative of the Federal balance and on that ground alone is untenable.

(o)

Title IX regarded solely as a tax would be invalid under the Fifth Amendment

All that has been said about the exaction levied by the State Act, as effected by the Fourteenth Amendment, clearly would be applicable here, should reality be ignored and Title IX be regarded as a pure tax.

Heiner v. Donnan, supra;

Coolidge v. Long, 282 U. S. 582, 596.

A tax for revenue levied upon employers of eight or more is as arbitrary as one exacted of all red-headed persons. We do not elaborate the argument because it is inconceivable that this Court will hold that Title IX is a real tax, or view it apart from its universally known background of purpose, objective, and effect.

CONCLUSION

Titles III and IX and their determination by this Court constitute a final crisis in the history of the Constitution.

It would be useless to pretend that the unemployment compensation provisions of the Federal Act do not present a final crisis in the political form of Government and in the economic life of America. This is no fortuitous statute, unrelated to a basic purpose. It represents a determined effort to destroy the equilibrium between the State and Federal Governments.

To ignore the certainties of disaster involved in Titles III and IX would not befit a member of this Bar in a case of this gravity. The purpose of this law is to strike at the heart of the police power of the States by the penalty provision in Title IX masquerading as a revenue tax and through the appropriation-control device of Title III, masquerading as a grant in aid.

All persons concerned in the preparation, report, transmission to Congress, testimony before Committees, report by Congressional Committees, enactment and approval of the Act appear upon the record to recognize that the provisions of Titles III and IX constitute the foundation for the establishment, and the control in material particulars by the Government of the form and administration, of State systems of unemployment compensation. This Court alone of all officers of Government is asked to ignore that certainty.

We have quoted the President. None of the President's Committee, nor the 127 members of the Advisory Committees, nor any of the 184 witnesses who testified before the Committees of Congress on the bill, appear to have been in doubt as to the purpose of the tax-credit device or the appropriation-control device to induce the adoption of State systems and to equalize the cost of employment in those states which did not conform. That the 10% not credited was to be retained to cover expenses of this particular integral scheme was asserted by the President in his Message (supra) and by Secretary Perkins (Senate Comm., p. 112).

The Secretary of Labor was Chairman of the President's Committee, she testified at length before the Committees. In explaining the tax provision of Title IX she stated its purpose to be that for which it had been recommended by the President's Committee, viz.:

> "to equalize the cost of doing business in every state, so far as it can be equalized, with regard to taking care of unemployed persons." Senate Comm., p. 126.
>
> "a very real equalization of competitive costs between employers in various states, so that there will be no special advantage to any employer to continue on his business in a state which does not have an unemployment insurance law." House Comm., p. 183.

The members of the President's Committee on Economic Security who transmitted the Report accompanying the Message of January 17, 1935 (H. D. No. 81, 74th Cong., 1st Sess.) were Frances E. Perkins, Secretary of Labor, Chairman; H. Morgenthau, Jr., Secretary of the Treasury; Homer Cummings, Attorney General; H. A. Wallace, Secretary of Agriculture; Harry Hopkins, Federal Emergency Relief Administrator.

She frankly told the House Committee that the Committee on Economic Security believed that "the device of utilizing the taxing power of the Federal Government" was the best method which the Committee could recommend at the time. (p. 183).

Dr. E. E. Witte, Executive Director of the President's Committee, testified at great length. In the connection above mentioned he said:

> "The system operates so that employers in a State that does not enact an unemployment compensation act will have the same cost as employers in States that do not. * * The disadvantage that a State puts itself under by enacting such an act is removed by this bill." House Comm., p. 34.

When the Committees of Congress made their reports they were in accordance with these expressions.

The Attorney General of the United States gave advice or opinion to the effect that if Congress would separate the tax from the appropriation no one could raise the question, followed by the Pickwickian conclusion that it would be reasonably safe to assume that the bill, if enacted into law, will probably be upheld as Constitutional. Cong. Rec., Vol. 79, Part 5, Col. 2, line 27. p. 5782

Confessedly if a tax for general revenue and a separate appropriation statute are historically unrelated and have no legislative nexus, they must in general stand separately before the Courts as they do among the laws; in such cases purposes or effects local in character that are in fact concomitant and are not palpably dominant escape the bar of the Constitution. So as to the specification of legislative details for safeguarding the expendi-

ture of appropriations made for a generic purpose within the tax-spending power, where the details only incidentally influence local conduct.

Those circumstances and their capacity for abusive extension call for a high sense of legislative and Constitutional morals when statutes, in fact directly related, are enacted separately or when the border line of doubt is plainly reached.

If, however, the split titles or separate statutes have been enacted without the benefit of such a sense, the case for the Constitution is not closed:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court."
>
> *Pollock v. Farmers L. & T. Co.,* per Fuller, C. J., 157 U. S. 429, at p. 581.

> "Passing the novel suggestion that two statutes enacted as parts of a single scheme should be tested as if they were distinct and unrelated, we think the legislation now before us is not susceptible of such separation and treatment."
>
> *United States v. Butler,* 297 U. S. 1, 58.

A glaring instance of contempt for constitutional sub-

stance is illustrated by the action of Congress following *Railroad Retirement Board v. Alton R. R., supra.**

THE END SOUGHT

The intent is, plainly, to force this court to accept the totalitarian conception of Federal power; here, immediately, to accept without scrutiny all concomitant attributes as to all taxes, however trivially intended or effective as revenue measures, and to approve the "continuing control" theory as to all appropriations, however they may purchase local action.

The immediate question before this Court is whether a federal tax intended to fail as a revenue measure (here to the extent of 90%) and to operate *upon the police power of the State itself* (not, as in the Child Labor Tax Case, merely upon individual manufacturers), has for its dominant purpose taxation; and if so, whether it can be sustained under the doctrine of the Federal balance where it concomitantly affects, not merely private individuals, as in *Magnano v. Hamilton, supra,* but the sovereignty of the State itself.

Also whether the provisions of Title III, effecting continuing control of discretionary aspects of a sovereign state function, (not merely the qualification of individuals to receive Federal bounty), also violates the express terms of the Tenth Amendment as well as the equally powerful implied negation of the Federal equilibrium.

But beyond those immediate questions, which, we submit, must be resolved against the Government, this Court is faced

*The District of Columbia Supreme Court held that the two acts adopted following that decision "show an attempt by Congress to accomplish under certain of its powers an end which has been held to be unconstitutional." 16 F. Supp. 955, 957.

with the question whether the Constitution is to be surrendered to a practice, advanced to the status of a habit in recent years, to use the "concomitant purpose' theory of federal taxation and the "control" theory of Federal appropriation to destroy the Constitution.

In short, surrender the Constitution to deception (Title IX) and bribery (Title III).

If that combination of devices is to be tolerated as the measure of Federal power, then in the not distant future we may anticipate the end of our Federal system and the accession of the totalitarian state, not by amendment, not by civil war or revolution, but by the moral degeneracy of the Constitutional concept.

That result can not be accomplished with the approval of this Court.

Respectfully submitted,

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